DOCKET

SHOW PROCEEDINGS AND ORDERS DATE: [12/12/88]

CASE NBR: [87-1961] AFx STATUS: [ ]
SHORT TITLE: [Huntington, NY, et al.]
VERSUS [Huntington Br., NAACP, et al] DATE DOCKETED: [05/25/88]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
May 25 1988		Statement as to jurisdiction filed.
Jun 20 1988		Motion of New York Planning Federation for leave to file a brief as amicus curiae filed.
Jun 24 1988		Brief amicus curiae of United States filed.
Jun 24 1988		Motion of appellees Huntington Branch, NAACP, et al. to dismiss or affirm filed.
Jun 28 1988		DISTRIBUTED. September 26, 1988
Jun 30 1988		Reply brief of appellants Huntington, NY, et al. filed.
Sep 30 1988		REDISTRIBUTED. October 7, 1988
Oct 11 1988		REDISTRIBUTED. October 14, 1988
Oct 18 1988		REDISTRIBUTED. October 28, 1988
Oct 31 1988		REDISTRIBUTED. November 4, 1988
Nov 7 1988		Motion of New York Planning Federation for leave to file a brief as amicus curiae GRANTED.
Nov 7 1988		Judgment AFFIRMED. Opinion per curiam. Justice White,

Last page of docket

SHOW PROCEEDINGS AND ORDERS DATE: [12/12/88]

CASE NBR: [87-1961] AFx STATUS: [ ]
SHORT TITLE: [Huntington, NY, et al.]
VERSUS [Huntington Br., NAACP, et al] DATE DOCKETED: [05/25/88]

PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
Nov 7 1988		Judgment AFFIRMED. Opinion per curiam. Justice White, Justice Marshall and Justice Stevens would note probable jurisdiction and set the case for oral argument.
Nov 30 1988		Petition for rehearing filed.
Dec 7 1988		DISTRIBUTED. Jan. 6, 1989. (Rehearing).

JURISDICTIONAL

STATEMENT

87-1961

Supreme Court, U.S.
FILED
MAY 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

—v.—

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

JURISDICTIONAL STATEMENT

RICHARD C. CAHN,
Special Counsel to the
Town of Huntington

CAHN WISHOD WISHOD & LAMB
Attorneys for Appellants
534 Broadhollow Road
CB-179
Melville, New York 11747
(516) 694-2300

Richard C. Cahn
Scott M. Karson
On the brief

QUESTIONS PRESENTED

1. What is the appropriate standard for the establishment of a municipal defendant's liability under the Fair Housing Act (42 U.S.C. § 3601, popularly known as Title VIII of the Civil Rights Act of 1968)? Can such a violation be established where the Court finds that the defendant's actions were taken in all respects without discriminatory intent? Is the Title VII concept of "*prima facie*" case applicable to Title VIII, *viz.*, is discriminatory effect, without discriminatory intent, sufficient to establish a *prima facie* violation of Title VIII by a municipality's application of its zoning code? If so, in determining whether a governmental defendant's actions were justified, what scrutiny should be given to those actions?

2. Can a violation of Title VIII be established where the trial Court finds as a fact that a municipal defendant has properly exercised its zoning and planning powers under state law by providing a "properly balanced and well ordered plan for the community," has "given sufficient consideration to regional [housing] needs and requirements," and has acted in all respects without discriminatory intent, and where those findings are not disturbed by the Court of Appeals?

3. Where no application for site-specific zoning relief was ever made to the municipal body possessing jurisdiction and, accordingly, no environmental, health, traffic and planning studies or public hearing as required by state law were ever conducted, was it an unwarranted intrusion by the U.S. Court of Appeals into the state's police power and legislative processes to order site-specific relief, particularly where all of the appellees' constitutional claims were dismissed?

4. Does the Court of Appeals, notwithstanding Rule 52(a) of the Federal Rules of Civil Procedure, have the right to set aside a finding of fact by the trial Court which was based upon the testimonial admissions of the appellees' own witnesses that no zoning application was ever made?

5. Where no showing was made that appellees possessed a reasonable likelihood of financing a low-income housing project, whose cost in 1985 was estimated to be in excess of $7,500,000, should the Court of Appeals have affirmed the judgment in favor of appellants on mootness or standing grounds?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	5
JURISDICTION	6
STATUTES INVOLVED	7
STATEMENT OF THE CASE	8
THE QUESTIONS ARE SUBSTANTIAL	17
CONCLUSION	29
APPENDIX	1a

TABLE OF AUTHORITIES

Cases

PAGE

Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974).. ..... 4, 24

Agins v. City of Tiburin, 447 U.S. 255 (1980)..... 18

Arthur v. City of Toledo, 782 F.2d 565 (6th Cir. 1986). 25

Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975).....14, 20, 23

Berman v. Parker, 348 U.S. 26 (1954)..... 17

Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984)..... 25

Board of Managers of Southampton Commons Condominium v. Zoning Bd. of Appeals, Matter of, 132 Misc.2d 1074, 506 N.Y.S.2d 416 (Sup. Ct. 1986) 17

Brown v. Board of Educ., 347 U.S. 483 (1954)..... 19

City of New Orleans v. Dukes, 427 U.S. 297 (1976).... 6

Emjay Properties v. Town of Brookhaven, 42 A.D.2d 907, 347 N.Y.S.2d 736 (2d Dept. 1973)..... 29

Griggs v. Duke Power Co., 401 U.S. 424 (1971). ...2, 19, 20, 21, 28

Hills v. Gautreaux, 425 U.S. 284 (1976).....5, 28, 30

Huntington Branch, NAACP v. Town of Huntington ("Huntington I"), 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983)..... 6, 15

Huntington Branch, NAACP v. Town of Huntington, 668 F.Supp. 762 (E.D.N.Y. 1987), *rev'd*, No. 794, Docket No. 87-7892 (2d Cir. April 5, 1988)..... 5

PAGE

Huron Cement Co. v. Detroit, 362 U.S. 440 (1960) 18

James v. Valtierra, 402 U.S. 137 (1971) 4, 24

Joseph Skilliken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *cert. granted and remanded for further consideration*, 429 U.S. 1068 (1977), *aff'd on further consideration*, 558 F.2d 350 (6th Cir. 1977), *cert. denied*, 434 U.S. 985 (1977), *reh'g denied*, 434 U.S. 1051 (1978) 5, 25

Kamhi v. Planning Bd., Matter of, 59 N.Y.2d 385, 465 N.Y.S.2d 865, 452 N.E.2d 1193 (1983) 17

Keith v. Volpe, 618 F.Supp. 1132 (C.D. Cal. 1985) 8, 25

Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert denied*, 401 U.S. 1010 (1971) 23

Klebetz v. Town of Ramapo, 96 A.D.2d 898, 465 N.Y.S.2d 845 (2d Dept. 1983)..... 17

Larkin Co. v. Schwab, 242 N.Y. 330, 151 N.E. 637 (1926) 18

Lindsey v. Normet, 405 U.S. 56 (1972)..... 19

Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928) 22

Malone, In re, 592 F.Supp. 1135 (E.D.Mo. 1984), *aff'd*, 794 F.2d 680 (8th Cir. 1986) 24

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 15, 19, 20, 21

McMinn v. Town of Oyster Bay, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985) 18

Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights ("Arlington Heights II"), 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) 22, 23, 25, 26

PAGE

Muscillo v. Town Bd., 28 Misc.2d 79, 211 N.Y.S.2d 939 (Sup. Ct. 1961) 18

Nattin Realty v. Ludewig, 67 Misc.2d 828, 324 N.Y.S.2d 668 (Sup. Ct. 1971) 18

Otero v. New York Housing Auth., 484 F.2d 1125 (2d Cir. 1973)..... 24

Overhill Bldg. Co. v. Delany, Matter of, 28 N.Y.2d 449, 322 N.Y.S.2d 696, 271 N.E.2d 537 (1971) 18

Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert denied*, 435 U.S. 908 (1978) 8, 21, 23, 24 26, 27

Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 434 N.Y.S.2d 180, 414 N.E.2d 680 (1980), *cert. denied*, 450 U.S. 1042 (1981) 18

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972) 26

Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979).....20, 21

Salamar Bldrs. Corp. v. Tuttle, 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585 (1971) 18

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) 4, 24

Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982)..... 25

Southern Burlington County NAACP v. Township of Mt. Carmel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) 23

Suffolk Hous. Serv. v. Town of Brookhaven, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987) 14, 17

PAGE

Town of Bedford v. Village of Mt. Kisco, Matter of, 33 N.Y.2d 178, 351 N.Y.S.2d 129, 306 N.E.2d 155 (1973) 18

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) 22, 23, 24, 25, 26, 27

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp. ("Arlington Heights I"), 429 U.S. 252 (1977) . 4

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 1, 17, 19, 22

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 1, 17, 18, 19

Washington v. Davis, 426 U.S. 229 (1976) 4

Statutes

Federal Rules of Civil Procedure § 52(a)..... i, 13

Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 (August 22, 1974)..... 9

Huntington Town Code § 198-1 18

Huntington Town Code § 198-20.....*passim*

Huntington Town Code § 198-126 12

Huntington Town Code § 198-131 12

N.Y. Public Officers Law § 100, *et seq.* 12

N.Y. Town Law § 261-265..... 12

N.Y. Const., Art. 3, § 1..... 17

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* .....*passim*

PAGE

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* .....*passim*

12 U.S.C. § 1715z-1 (1970 ed. Supp. V) 8

28 U.S.C. § 1254 (2) 6

42 U.S.C. § 1437f (1982 and Supp. III [1985]) 9

42 U.S.C. § 3604(a)..... 23

42 U.S.C. § 5304(c)(1)..... 11

Other Authorities

Comment, *Applying The Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.—C.L. L. Rev. 128 (1976) 27

Comment, *Developments-Zoning*, 91 Harv. L. Rev. 1427 (1978).....19, 23, 27

Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search For the Proper Standard*, 27 UCLA L. Rev. 398 (1979).....22, 27

Congressional Record, Vol. 114, pp. 3421-22 (February 20, 1968) 3, 4

Kushner, Fair Housing (1983) 24

Schwartz, *The Fair Housing Act and "Discriminatory Effect": A New Perspective*, 11 Nova L. Rev. 71 (1986) 4, 28

JURISDICTIONAL STATEMENT

In this case, the Court is called upon to decide to what extent Title VIII of the Civil Rights Act of 1968 was intended to reach facially neutral zoning policies which have long been typical of most of America's suburban municipalities.

Justice Marshall has stated that:

> Zoning is a complex and important function of the state. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) . . . that deference should be given to governmental judgments concerning proper land use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land use control mechanisms . . . . Our role is not and should not be to sit as a zoning board of appeals.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

Although *Boraas* reaffirmed the principle that zoning regulations will be sustained against constitutional challenge if they have a rational basis or are "fairly debatable," the Court has never determined the appropriate level of scrutiny to which such governmental actions are to be subjected under Title VIII.

During the past twenty years, the various Circuits have rendered conflicting decisions on Title VIII standards. In this case, the appellant Town was found by the trial Court, not only to have been non-exclusionary, but to have been "a leader in providing public housing in Suffolk County." Appendix 85a.[1]

The trial Court also found:

---

1 The record reflects that Huntington, which has 15 percent of the County's population, has 28 percent of the County's subsidized housing, and 62 percent of the County's public housing within its borders.

> [T]he failure to rezone for [appellees' proposed project] was not motivated by discriminatory intent. What is more, plaintiffs have been unable to show that the Town had a history of perpetuating segregation by confining subsidized housing to the Huntington Station area. Plaintiffs have not proved a segregative intent or effect in connection with the establishment of Gateway Gardens or Whitman Village, or the rehabilitation of the Lincoln School. Nor is there persuasive proof that enactment or implementation of the zoning code has perpetuated segregation or been motivated by discriminatory impulses. The same may be said of the Town's policy regarding section 8 existing and rehabilitation programs.

Appendix 82a.

Without disturbing the finding that the Town was "not motivated by discriminatory impulses," the Second Circuit has held that Huntington violated Title VIII (1) by maintaining a zoning code provision which facially restricted private development of multi-family housing to a former urban renewal area (despite total lack of proof that the provision had ever been applied to preclude any private applicant from securing multi-family zoning and the affirmative proof that it had been interpreted to authorize rezoning for privately-developed low-income housing outside of the former urban renewal area); and (2) by rejecting appellees' "application" to rezone 14.6 acres of land outside of the former urban renewal area (despite the trial Court's findings that no such application was ever made).

The Second Circuit applied the "discriminatory effect" test derived from Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that Huntington's code had a *prima facie* discriminatory effect because it "significantly perpetuated segregation," and that the Town's "refusal to rezone" appellees' land caused "disproportionate harm to blacks" because "7% of all Huntington families needed subsidized housing, while 24% of the black families needed such housing" and "minorities constitute a far greater percentage of those currently occupying subsidized rental projects compared to their percentage in the Town's population." Appendix 27a. The Court of Appeals

rejected the trial Court's conclusion that the showing of discriminatory effect was "not overwhelmingly strong," which had been based upon the fact that the population eligible for housing subsidies consisted of 22,160 white persons and 3,671 minority persons. Appendix 82a. The Second Circuit then required that the Town show "a *bona fide* and legitimate justification for its action with no less discriminatory alternatives available." Appendix 27a. In judging the Town's justifications, the Court held that "the balance should be more readily struck in favor of a plaintiff" which claims its plans were interfered with. Appendix 32a. The Second Circuit found "entirely insubstantial" the Town's concerns related to sewage disposal, lack of conformity with the low density of the surrounding neighborhood, and inaccessibility of the site to public transportation, Appendix 31a, despite the fact that the testimony without dispute showed these to be classic zoning and planning concerns. Also, the Second Circuit found Title VIII liability in the face of the trial Court's findings that the Town fully complied with state law by giving sufficient consideration to regional housing needs and requirements and by providing a properly balanced and well-ordered plan for the community. Appendix 85a.

Congress' main purpose in enacting Title VIII was to end discrimination against those who could afford better housing but had been denied the opportunity to purchase or rent it. As Senator Mondale stated:

> I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.

114 Cong. Rec. 3421 (Feb. 20, 1968).

• • •

> We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that . . .

114 Cong. Rec. 3422 (Feb. 20, 1968).

The legislative history of Title VIII does not indicate that Congress intended to outlaw facially neutral zoning practices which may result in economic discrimination, *see*, *James v. Valtierra*, 402 U.S. 137 (1971); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), or to impose an affirmative obligation upon municipalities to construct low-income housing, *see*, *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974). Discriminatory actions of real estate brokers, home owners who utilize advertising or brokers' services, and lending institutions which engage in "redlining," were Congress' principal concerns.

Such history suggests that in the absence of discriminatory motivation, which would support a claim of discrimination under the equal protection clause, *see*, *Washington v. Davis*, 426 U.S. 229, 246-48 (1976); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), no Title VIII violation can be established.

Various shortcomings have been recognized with respect to the models thus far established by the Courts of Appeals in determining whether municipal action has resulted in a discriminatory effect. One principal shortcoming particularly relevant to this case is that the decisions thus far do not make a distinction between a municipality's failure to initiate steps to create public housing, and a municipality's abandonment of efforts that have once begun, and that—

> [T]he result of the distinction is that a municipality whose liberal attitude towards low-income projects leads it to consider them seriously will more likely be found in violation of the act than a municipality whose illiberal attitude prevents even the slightest consideration of a project.[2]

Although appellees made no zoning application in compliance with the procedures mandated by New York law, the Second Circuit granted site-specific relief, directing the Town to rezone for multiple-family use appellees' 14.6 acre parcel of

2 *See*, Schwartz, *The Fair Housing Act and "Discriminatory Effect": A New Perspective*, 11 Nova L. Rev. 71, 85 (1986).

land. Since appellees' constitutional claims were dismissed, that grant of relief violates this Court's stricture that the "remedial powers of the federal courts to restructure the operation of local and state governmental entities" is not plenary but may be exercised "only on the basis of a constitutional violation." *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976).

The drastic character of the relief granted by the Second Circuit is highlighted by its refusal to remand to afford the Town the opportunity to present evidence as to the suitability of 63 alternative sites for appellees' project, which the Court conceded it would "ordinarily" have done. Appendix 34a. The Court principally justified its action by concluding that the Town "has demonstrated little good faith in assisting the development of low-income housing" and that HUD had expressed its "dissatisfaction" with the Town's performance. Appendix 34a. However, those conclusions are neither fair nor based on the record, since HUD repeatedly found that the Town had acted in good faith and had not violated Title VIII.

As the Sixth Circuit noted in *Joseph Skilliken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *cert. granted and remanded for further consideration*, 429 U.S. 1068 (1977), *aff'd on further consideration*, 558 F.2d 350 (6th Cir. 1977), *cert. denied*, 434 U.S. 985 (1977), *reh'g denied*, 434 U.S. 1051 (1978):

> A federal court ought not to exercise state legislative functions. It is without power to do so, and furthermore, does not develop proficiency in that field.

528 F.2d at 881.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is not officially reported and is reprinted in the Appendix, pp. 1a-35a.

The memorandum decision of the United States District Court for the Eastern District of New York (Glasser, J.) is reported at 668 F. Supp. 762 (E.D.N.Y. 1987) and is reprinted in the Appendix, pp. 38a-86a.

JURISDICTION

On February 23, 1981, appellees brought suit in the United States District Court, Eastern District of New York, seeking to invalidate a provision of the Zoning Code of the Town of Huntington on federal constitutional, statutory and state law grounds, and to compel the Town to rezone property upon which they possessed a purchase option to permit construction of a low-income housing project. On motion of the defendants (which then included the United States Department of Housing and Urban Development ["HUD"]), the District Court (Costantino, J.) dismissed the complaint for lack of standing. On appeal, the Court of Appeals for the Second Circuit reversed and reinstated the complaint. 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) ("*Huntington I*"). On remand, the matter was reassigned to District Judge I. Leo Glasser.

After a non-jury trial, the District Court dismissed the complaint in its entirety, and appellees appealed the dismissal of the Title VIII claims. On April 5, 1988, the Court of Appeals reversed, declared Section 198-20 of the Huntington Town Code invalid as repugnant to Title VIII and granted site-specific zoning relief. No rehearing was sought in the Court of Appeals. A notice of appeal to this Court was filed on April 22, 1988.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(2). *See, City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976).

STATUTES INVOLVED

42 U.S.C. § 3604(a). Discrimination in sale or rental of housing
(Reprinted in the Appendix, p. 91a)

New York Town Law § 261 (McKinney, 1987)
(Reprinted in the Appendix, p. 91a)

New York Town Law § 262 (McKinney, 1987)
(Reprinted in the Appendix, p. 91a)

New York Town Law § 263 (McKinney, 1987)
(Reprinted in the Appendix, p. 91a)

New York Town Law § 264 (McKinney, 1987)
(Reprinted in the Appendix, p. 92a)

New York Town Law § 265 (McKinney, 1987)
(Reprinted in the Appendix, p. 93a)

Code of the Town of Huntington, § 198-20
(Reprinted in the Appendix, p. 94a)

Code of the Town of Huntington, § 198-126
(Reprinted in the Appendix, p. 95a)

Code of the Town of Huntington, § 198-127
(Reprinted in the Appendix, p. 95a)

Code of the Town of Huntington, § 198-128
(Reprinted in the Appendix, p. 95a)

Code of the Town of Huntington, § 198-129
(Reprinted in the Appendix, p. 95a)

Code of the Town of Huntington, § 198-130
(Reprinted in the Appendix, p. 97a)

Code of the Town of Huntington, 198-131
(Reprinted in the Appendix, p. 97a)

STATEMENT OF THE CASE

In 1978, members of Housing Help, Inc. ("HHI"), a housing advocacy group on Long Island, discussed with Suffolk Housing Services, Inc. ("SHS"), an organization which finances fair housing litigation and which has been paying HHI's expenses for this suit, the possibility of legal action against the Town of Huntington, to invalidate Section 198-20 of the Huntington Town Code, which established the R-3M zoning district for multiple-family dwellings. The two groups wished to establish that the Town's maintenance of Section 198-20 limited privately-constructed multi-family dwellings to the Town's former urban renewal area in violation of the fourteenth amendment, Title VIII, and New York law. Only the Title VIII claim remains to be considered by this Court.

1. The Background of Section 198-20

Section 198-20 had its origins in the 1960's when the Town adopted an urban renewal plan for a portion of the Huntington Station area, which contained the oldest housing in the Town and was characterized by severe housing blight and deterioration. The Town intended to demolish buildings in a substantial portion of the urban renewal area and, unlike the defendants in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), and *Keith v. Volpe*, 618 F. Supp. 1132 (C.D. Cal. 1985), to construct low-income housing for the residents displaced, a goal which appellees' expert witness endorsed. The Huntington Housing Authority, a separate agency charged by state law with providing subsidized housing opportunities (but which was not made a party to this case), commenced construction in 1964 of Gateway Gardens, Suffolk County's first public housing project. At that time, the Town's zoning ordinance already permitted multiple-family housing projects owned or operated by the Housing Authority to be located anywhere in the Town. However, the centerpiece of the Town's urban renewal plan was to be Whitman Village, a 262-unit Section 236 cooperative, to be constructed by a private developer with financial assistance under 12 U.S.C. § 1715z-1 (1970 ed. Supp. V). Hence, the Town's zoning code had to be

broadened to permit a multiple-family rezoning at the request of a private developer. This was delayed until 1969 at HUD's request, to enable the Town to first acquire all the lands required for urban renewal. When Section 198-20 was enacted, it continued to permit the Housing Authority to build multi-family housing townwide and permitted privately-developed multi-family housing to be constructed in the urban renewal area. The Town Board, the Town's legislative body, engaged an architect and sold to Melville Industrial Associates ("MIA"), a private developer, an 8.6-acre parcel of Town-owned urban renewal land directly facing the railroad station, rezoning 6 acres to R-3M with the purpose of having luxury multi-family housing constructed there. Although the private developer never performed under his contract,[3] a significant infusion of other needed private capital was invested in building improvements in Huntington Station during the years since 1969.

Congress terminated the urban renewal program in 1974, and replaced it with community development programs under the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 (August 22, 1974). Huntington's urban renewal program came to an end, and the Town began to participate in the community development program in 1976 by creating a Community Development Agency and by applying to HUD for community development block grants ("CDBG's").

In 1978, a private developer, Regan Associates, proposed to convert the abandoned Lincoln School to low-income housing, using funds under the Section 8 Substantial Rehabilitation Program, 42 U.S.C. § 1437f (1982 and Supp. III [1985]). The Community Development Agency sought an opinion from the Town Attorney as to whether R-3M zoning would be available to Regan since Lincoln School lay outside of the former urban renewal area. Responding in the affirmative, the Town Attorney noted that the Town's urban renewal program had been super-

---

3 Ultimately, ownership of the property reverted to the Town, which, in 1980, secured HUD approval to construct 150 units of low-income housing on the MIA site. Appellees sought injunctive relief in this action to prevent construction of such a project on the grounds that it would increase concentration of racial minorities, and ultimately the Town withdrew the project.

seded by the community development program, and that in its first CDBG application in 1976, the Town Board had identified as community development areas 12 census tracts which, on the basis of a 1975 housing study, contained a considerable amount of substandard and deteriorated housing which the Board had earmarked for improvement. The Town Attorney concluded that Section 198-20's reference to the urban renewal area (which no longer existed) should thenceforth be construed to apply to the community development areas. The Town Board accepted his opinion, thereby dramatically increasing the amount of land within the Town available for R-3M use by private developers, and rezoned the school property to R-3M. The Lincoln School was rehabilitated and converted to 30 units of low-income housing which were thereafter rented to eligible families.

In early 1980, SHS, through counsel that it shared with HHI, filed a formal "administrative complaint" with HUD, claiming that Section 198-20 limited construction of multi-family housing to the urban renewal area. This formal complaint was rejected by HUD on the grounds that the Town code was not applied in the manner suggested, and that the "Town demonstrated its credibility" by rezoning the Lincoln School property.

In September, 1980, the Town's Planning Director sent a letter expressly advising SHS that the R-3M zoning category was available in "a series of census tracts [which] have been designated as being eligible areas in which Federal funds may be expended," and that a federally funded multiple-family housing project could be located within those areas. SHS and HHI were then cooperating closely to prepare this litigation against the Town.

Despite the appellees' actual knowledge that Section 198-20 had not been applied as written since the urban renewal area had ceased to exist, they filed this suit in 1981 alleging that the provision prevented private developers from building low-cost housing except in the former urban renewal area.

During the pendency of this litigation, HHI and SHS also became administrative adversaries of the Town during meetings and in correspondence with HUD in which they urged HUD to

disapprove the Town's Housing Assistance Plans ("HAP's")[4] and reject its CDBG applications on the specific grounds that Section 198-20 was discriminatory. HUD refused to disapprove either the HAP's or the CDBG applications. During this period, appellees concealed from HUD their knowledge that the code provision had been broadly applied by the Town Board and that they had been expressly advised by the Town's Planning Director that the provision would not be applied to prevent private developers from securing multi-family zoning for property outside of the former urban renewal area.

In December, 1987, after the trial Court's decision in this case, the Town Board again broadly applied Section 198-20 and rezoned to R-3M five acres of land in a community development area nine miles from the former urban renewal area, to accommodate a 50 unit public housing project, to be built and initially owned by a private developer.

2. The "Matinecock Court" Controversy

The basis of HHI's standing in this action was its acquisition in early 1980 of an option to purchase 14.6 acres of land whose principal virtue was that it was located in an area of the Town that was "98% white." HHI's ostensible purpose was to construct a 162-unit Section 8 development in that location.

The trial Court found that HHI selected its land without any knowledge of the contemporary state of Huntington's zoning map, and without seeking advice from the Town's planning authorities. HHI's witnesses testified that they were unaware that the Town had a comprehensive master plan (as required by state law) and that the land they selected was not classified under that plan for future multi-family use. Appendix 78a-79a. The area

---

4 A community without an approved HAP cannot receive community development funds. 42 U.S.C. § 5304(c)(1). Huntington's HAP's were approved for 1979–1982 and 1982–1985 over appellees' objections, after HUD determined that the Town was in compliance with Title VIII. The trial Court noted the possible connection between appellees' strenuous efforts in 1983 to prevail upon HUD to withhold its approval of the Town's HAP, which, if successful, could have allowed appellees to make their own application to HUD to accomplish indirectly what they could not accomplish directly—forcing the Town "to make whatever modifications or adjustments [appellees require] to accomplish [their] own proposal."

was zoned for one-acre residential use, and by 1980 substantial single-family residential development had taken place. In effect, the trial Court found that appellees did not have the most rudimentary understanding of the rezoning process in New York. Moreover, at no time did it appear from the evidence that HHI possessed any reasonable likelihood of financing their proposed project.

In February, 1980, concealing from the Town Board that they had just met with their lawyers to discuss litigation against the Town, members of HHI sought an "informal" "get acquainted" meeting with the Town Board. At this non-public meeting, they asked the four Board members who were present to grant R-3M zoning to their option parcel. One Board member testified that he and the other three members felt "sandbagged" by this request, and told the HHI representatives to follow the formal zoning procedures prescribed by the code. Attempting to engage in a substantive discussion of legislative matters in a closed, non-advertised meeting is violative of New York's Open Meetings Law, New York Public Officers Law §§ 100-111 (McKinney Supp. 1987), about which HHI's representatives professed ignorance. Appendix 79a-80a.

At a hearing on February 26, 1980 of the Town Board members in their capacity as directors of the Community Development Agency, a representative of HHI handed up one copy of a document which contained "a number of suggestions for the Community Block Grant application." He did not describe it further. The paper produced from the Town Clerk's file during this litigation sought, among other things, "a commitment by the Town to amend the zoning ordinance to allow multi-family rental construction by a private developer." The February 26, 1980 document was not a site-specific rezoning application, and was not treated as such.[5] Indeed, the Supervisor did not recall ever seeing that paper.

It remains uncontroverted that the Town Board never had the opportunity to study and rule upon a rezoning application in

5 Huntington's formal zoning procedures are set forth in Code Sections 198-126 through 198-131. Appendix 95a-97a. These procedures are largely mandated by state law, *i.e.*, New York Town Law §§ 261-265 (McKinney 1987). Appendix 91a-94a.

the manner contemplated by law. Because the appellees failed to comply with state-mandated procedures, the first opportunity given to the Town to justify the single-family, one-acre zoning of the option property was at trial, where evidence was adduced that the property should not be rezoned to R-3M by reason of "sewage concerns, lack of conformity with the low density of the surrounding neighborhood and inaccessibility of the site to public transportation," and inconsistency of the appellees' proposal with the Town's comprehensive plan.[6]

Although the trial Court expressly found that these considerations were supported by the evidence and constituted legitimate and non-discriminatory reasons for denying rezoning of the property, Appendix 83a, the Second Circuit, in apparent disregard of the mandate of Rule 52(a) of the Federal Rules of Civil Procedure, reversed and substituted its own inexplicable finding that the Town's concerns were "insubstantial," "weak and inadequate" and constituted "*[p]ost hoc* rationalizations" entitled to "little deference." Appendix 31a.

Because the Town had an approved HAP, federal law required HUD to request the views of the Town Supervisor on whether HHI's proposal should be funded. He therefore wrote to HUD detailing the reasons why he did not recommend HUD's approval of the application.[7] Approximately two and one-half months later, the Town Board adopted a resolution, requesting that HUD "reject the application" by HHI to fund

6 The sanitary waste disposal problem was grave. Appellees' HUD applicaton called for an on-site sewage treatment facility, which would be inconsistent with Long Island's federally sponsored Waste Treatment Management Plan. A significant number of such facilities have failed to meet state health standards. The Waste Treatment Management Plan highlighted Suffolk County's total dependence upon a sole source acquifer and demonstrated the critical importance, *inter alia*, of efficient sewage-disposal systems—particularily in multi-family housing projects—matters as to which considerable trial testimony was taken.

7 These reasons pertained to traditional zoning and site development concerns: inconsistency with the HAP, zoning, traffic, parking and safety problems, and objections to inadequate recreational areas and undersized family living units.

the project.[8] HUD subsequently ranked the HHI proposal in a six-way tie for sixth place among 16 competing proposals for Section 8 assistance in Suffolk County, but none of the 16 proposals were funded because of the Reagan Administration's decision to suspend and ultimately terminate the Section 8 program. No HUD witness was able to say that the Supervisor's letter or Town Board resolution in any way adversely affected the HUD ranking of the proposal, or the fact that it, in common with the other 15 proposals, was not funded.

3. The Decisions Below

The trial Court found no evidence of discriminatory intent on the part of the Town in adopting and maintaining the R-3M provision, and no "persuasive proof that enactment or implementation of the zoning code had perpetuated segregation or been motivated by discriminatory impulses" or that "the Town had a history of perpetuating segregation by confining subsidized housing to the Huntington Station area." Appendix 82a. The trial Court dismissed appellees' pendent state claims, finding that the Town had satisfied the requirements of *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110, 378 N.Y.S.2d 672, 680-681, 341 N.E.2d 236 (1975), by providing "a properly balanced and well-ordered [land use] plan for the community" and giving due consideration to "regional [housing] needs and requirements."[9] The trial Court was also aware of the recent New York Court of Appeals decision in *Suffolk Hous. Serv. v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 926, 511 N.E.2d 67 (1987), which held that a "municipality may not legitimately exercise its zoning power to effectuate socio-

8 This is the resolution that the Second Circuit erroneously treated as a denial of a site-specific zoning application. Appendix 12a-14a.

9 The trial Court found that the Town's zoning code constituted and provided a properly balanced and well-ordered plan for the community, giving sufficient consideration to regional housing needs and requirements. As the trial Court noted, New York law provides, *"[I]f a district is set aside for multiple-dwelling development, there is no requirement that other portions of a town contain such developments."* Appendix 85a, quoting from *Berenson v. Town of New Castle*, 38 N.Y.2d at 109-110, 378 N.Y.S.2d at 680. 341 N.E.2d at 241-242 (1975) (emphasis by Judge Glasser).

economic or racial discrimination," and held that Huntington had not done so. The appellees did not appeal from the dismissal of the state claims, and the trial Court's holdings on such claims are binding upon them.

The Second Circuit, in a radical restructuring of the facts, accepted controverted testimony by the appellees' witnesses as true; rejected the testimony of the appellants' witnesses;[10] and ignored HUD's repeated administrative findings that the Town had not violated Title VIII. Although appellees conceded, and the trial Court found, that they had never made a site-specific application, the Second Circuit inexplicably found that "both parties . . . clearly understood that an application for a zoning change had been made." Appendix 14a.[11] The Court of Appeals did not disturb the trial Court's finding that there was no discriminatory intent, but held that a violation of Title VIII can be established without a showing of discriminatory intent. The Court refused to apply the discriminatory treatment test, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to the circumstances surrounding appellees' low-income housing proposal, because "there is always some discrete event . . . which touches off litigation challenging a neutral rule or policy." Appendix 17a.

The Second Circuit did not comment upon the evidence demonstrating that the Town had broadly applied its code provision in connection with the Lincoln School conversion, and implied that the appellees had not been informed of the availability of

10 For example, the Second Circuit found that "Town officials never mentioned that HHI should be pursuing a different application process." Appendix 14a. Yet Town Board member Edward Thompson testified that HHI's members were specifically advised of the customary zoning procedures; that no exceptions could be made to those procedures; and that if they desired a zoning change, they would have to file a rezoning application to pursue the normal process. According to Thompson, appellees' representatives were "unhappy" and requested "special or preferential treatment" from the Town on the grounds that HHI is a "charitable, ecumenical organization."

11 The Court of Appeals regarded its decision in *Huntington I*, 689 F.2d at 393, n. 3, as precluding reliance by the appellants upon lack of a zoning application. Appendix 13a. *Huntington I*, however, only concerned appellees' standing to sue.

privately-developed multi-family zoning outside of the former urban renewal area before they filed suit. Appendix 7a, n. 4.[12] The Court also refused to take judicial notice of further evidence of the Town's willingness to permit R-3M zoning in the community development areas, in the form of a 1987 rezoning, although that rezoning is consistent with the Lincoln School rezoning and confirms the Town's liberalized interpretation of Section 198-20.

Because the Court of Appeals refused to consider that the community development areas were available for R-3M zoning, it never analyzed whether the code provision as applied to those areas would have a segregative effect, despite the fact that those areas contained only a 10.2 percent minority population, not drastically different from the Town-wide minority population of 6.5 percent.

Finally, the Court of Appeals ignored the fact that appellees never pursued the state's mandated rezoning procedures, and by judicial fiat directed the Town to bypass those procedures and immediately rezone the appellees' land to R-3M, without any concern that the required environmental studies (which would have demonstrated whether the property could meet all of the sewage disposal, water supply, traffic safety and other requirements) had never been undertaken.[13]

The questions raised in this Jurisdictional Statement were raised by the pleadings and the briefs in the District Court and in the Court of Appeals.

---

12 The Court apparently confused the Town Attorney's 1978 letter relating to Lincoln School with the Planning Director's 1980 letter expressly advising SHS, the appellees' collaborator, of the availability of R-3M zoning in the community development areas. Since appellees never conferred with the Planning Director before acquiring their option, it is not surprising that they did not see a copy of the 1978 letter until discovery took place in this action.

13 The Court also ignored the evidence indicating that there is no realistic chance of funding for the appellees' project and that therefore, they lack standing to prosecute this action, and it is moot.

THE QUESTIONS ARE SUBSTANTIAL

1. Zoning Decisions Are Entitled to Great Deference In Both the Federal and State Courts

Ever since 1926, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court has regarded the power to zone as extremely broad:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the most conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not limit it.

Berman v. Parker, 348 U.S. 26 (1954).

Stated otherwise,

> [t]he police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet, seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The state courts also elevate zoning to a favored position in the pantheon of police powers. In New York, the Constitution vests the police power in the state itself, N.Y. Const., Art. 3, § 1, which has delegated the zoning and land use portion of the police power to its local municipalities. *E.g.*, *Matter of Kamhi v. Planning Bd.*, 59 N.Y.2d 385, 465 N.Y.S.2d 865, 452 N.E.2d 1193 (1983); *Suffolk Hous. Serv. v. Town of Brookhaven*, 70 N.Y.2d 122, 517 N.Y.S.2d 924, 511 N.E.2d 67 (1987).

Where a town fails to adhere to procedural requirements in enacting or amending its zoning ordinance, that procedural infirmity will result in judicial nullification of the town's action. *Klebetz v. Town of Ramapo*, 96 A.D.2d 898, 465 N.Y.S.2d 845 (2d Dept. 1983); *Matter of Bd. of Managers of Southampton Commons Condominium v. Zoning Bd. of App.*, 132 Misc.2d 1074, 506 N.Y.S.2d 416 (Sup. Ct. 1986). But if a town exercises its power in accordance with state law requirements, its zoning decisions may not be set aside except by proof beyond a reason-

able doubt. *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985). Most of the other states impose a similar burden upon a plaintiff seeking to set aside a zoning enactment.

Appellants' zoning code was adopted in accordance with the state's procedures and with its own comprehensive plan which it adopted in 1965,

> for the purpose of promoting health, safety, morals and general welfare . . . [and] designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water supply, sewage disposal, schools, parks and other public requirements.

Huntington Town Code Section 198-1.[14]

Each of the purposes articulated in the Town's code are in harmony with the state's enabling legislation and have been found by both this Court and state courts to justify the exercise of the zoning power. *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960) (pollution regulations); *Salamar Bldrs. Corp. v. Tuttle*, 29 N.Y.2d 221, 325 N.Y.S.2d 933, 275 N.E.2d 585 (1971); *Nattin Realty v. Ludewig*, 67 Misc.2d 828, 324 N.Y.S.2d 668 (1971); *Muscillo v. Town Bd.*, 28 Misc.2d 79, 211 N.Y.S.2d 939 (1961) (population density regulations to protect water supply and provide adequate waste and sewage disposal). *Matter of Overhill Bldg. Co. v. Delany*, 28 N.Y.2d 449, 322 N.Y.S.2d 696, 271 N.E.2d 537 (1971); *Larkin Co. v. Schwab*, 242 N.Y. 330, 151 N.E. 637 (1926) (traffic congestion); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 434 N.Y.S.2d 180, 414 N.E.2d 680 (1980), *cert. denied*, 450 U.S.

---

14 One of New York's requirements is that the zoning power be exercised "in accordance with a comprehensive plan," reflecting consideration of the needs of the community as a whole. *Matter of Town of Bedford v. Village of Mt. Kisco*, 33 N.Y.2d 178, 188, 351 N.Y.S.2d 129, 136, 306 N.E.2d 155 (1973).

1042 (1981) (control of population density, preventing overcrowding and undue concentration of population, by imposition of minimum lot area requirements or by exclusion of multi-family housing from a particular district).

In common with the appellees, some commentators argue that this entire body of state zoning law, the progeny of *Euclid*, is a principal means by which municipalities have perpetuated housing discrimination in this country. *See*, Comment: *Developments-Zoning*, 91 Harv. L. Rev. 1427, 1683-1684 (1978). However, that contention is unfounded and fails to appreciate the importance of the zoning power, which is the specific means by which municipalities can ensure that critical environmental concerns such as water and resource preservation and waste management are addressed, and by which the use of the finite available land within the borders of each such municipal entity may be determined in a fair and orderly manner, with due regard for public safety and present and future need. Because the municipal zoning power is so critical to the protection of the "quality of life," *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), strong evidence ought to be required that the power has been used to serve racially discriminatory ends, before it is curtailed. In this case, there is no evidence that zoning, rather than economics, has been the principal factor in determining where people live in Huntington.

Although zoning regulations which violate a fundamental right may not be entitled to the same deference, *Village of Belle Terre v. Boraas*, 416 U.S. at 7, this Court has already held that housing is not a fundamental right. *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

2. The Law Is Unsettled and In Conflict As To the Proof Necessary to Establish A Title VIII Violation

This Court has spoken forcefully and clearly in the critically important areas of school discrimination, *e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and employment discrimination, *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); this case

presents an appropriate opportunity for the Court to speak on the subject of housing discrimination. Since appellees originally claimed that the zoning code was invalid under New York law, *see*, *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975), and their state claim was also dismissed by the District Court and not appealed, the issues presented here squarely involve the construction and application of an important federal statute, and there is no basis to decide this case on independent state law grounds.

A. If Titles VII and VIII Are Parallel, the *McDonnell Douglas* Disparate Treatment Test Should Apply To Cases Involving Zoning Applications

Although the Second Circuit saw a "persuasive parallel" between Title VII and Title VIII, it declined to apply the disparate treatment test prescribed by *McDonnell Douglas* to appellees' claim that the Town treated minority applicants for rezoning less favorably than it had previously treated white applicants for rezoning of a parcel for senior citizen's housing.[15]

Such direct comparison of the supposedly disparate treatment accorded to white and minority applicants involves a conceptually different analysis than that required by the disparate impact test of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In the former case, similarly situated minority and white applicants are treated differently; in the latter case, a facially neutral rule operates to the detriment of the minority applicant, and the legitimacy of the rule itself is called into question. If Title VII

15 The Second Circuit itself treated a housing denial as suitable for application of *McDonnell Douglas* analysis. *Robinson v. 12 Lofts Realty*, 610 F.2d 1032, 1038 (2d Cir. 1979). A plaintiff's *prima facie* case is shown by evidence that he (1) is a minority group member; (2) applied for and qualifies for the housing opportunity; (3) is rejected; and (4) the housing opportunity remained available. Appendix 64a. There seems no reason why this test should be inapplicable to Title VIII claims arising out of a zoning application by a single applicant. If the test is applied here, the evidence showed that the Town of Huntington required the Methodist Church to file a formal rezoning application and pursue the normal zoning process, notwithstanding the fact that the Senior Citizens' zoning district they sought had not yet been created; appellees were thus unable to demonstrate that the Town had accorded different or better treatment to zoning requests by white persons.

and Title VIII are to be read *in pari materia*, then the *McDonnell Douglas* test should be applied to a claim of disparate treatment in a municipality's handling of a rezoning application.

The Second Circuit's confusion about the relevance of *McDonnell Douglas* to Title VIII is demonstrated by the Court's erroneous reference in this case to *Robinson* as an "impact" case. Appendix 17a-18a. Yet, the question of when the *McDonnell Douglas* test should be applied to zoning cases is of crucial importance to the fair and uniform enforcement of Title VIII. The District Court, for example, rejected appellees' claims that the Town treated similarly situated white and minority developers differently on the basis of race, in part because appellees were not in a position to claim that their zoning application received discriminatory treatment when they never made one. The Court of Appeals' decision not to utilize the *McDonnell Douglas* treatment test led it to disregard the appellees' admitted failure to present a formal rezoning application to the Town Board and to underestimate the significance of appellees' inability to establish a discriminatory motivation for the Town's actions.

B. The Circuits Are In Conflict Regarding the Requirements for a *Prima Facie* Case of Disparate Impact

In Title VIII cases, the Circuits have adopted variations of the Title VII test for disparate impact articulated by this Court in *Griggs*, but have not yet adequately considered the differences between the employment and zoning contexts to determine whether or how to apply the *Griggs* test to a case of allegedly exclusionary zoning.

If Title VIII is deemed to be applicable to the adoption of general zoning regulations or routine zoning decision-making, the statistical test employed by the Second Circuit (which seeks to identify the adversely affected group and to ascertain whether minorities are over-represented in that group, as compared to their percentage in the total population), seems clearly inappropriate. As the Third Circuit observed in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978):

> Although an employment practice with a discriminatory effect might be justified under Title VII by the fact that it is 'substantially related to job performance,' *Id.*, at 148, the counterpart to job performance in the housing field is less susceptible to definition and quantification.[16]

Zoning decisions often entail complex choices which benefit some at the expense of others, or require some citizens to sacrifice property rights so that the general community might enjoy the benefits of planned development. These unique problems clearly differentiate zoning decisions from employment decisions, where an interest-balancing process that weighs racial considerations against other factors is straightforward. Zoning is a paradigm of the line-drawing process which Justice Holmes ascribed to the legislative function. He knew that the drawing of lines was always open to criticism, but said that for precisely this reason the legislative decision "must be accepted unless we can say that it is very wide of any reasonable mark." *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (dissenting opinion), *cited in*, *Village of Belle Terre v. Boraas*, 416 U.S. at 8, n. 5.

(1) The Circuits have not consistently dealt with the regional implications of a municipality's zoning decisions. Zoning cases usually deal with a combination of intra-town and inter-town issues. *United States v. City of Black Jack*, 508 F.2d 1179, 1182-1183 (8th Cir. 1974) dealt with the obligation of a newly incorporated suburban area not to prevent the migration of blacks from St. Louis. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Hgts.*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1024 (1978) ("*Arlington Heights II*"), dealt with a village which had never taken any affirmative steps to construct low-cost housing within its borders to help remedy a "lopsided disparity" between its racial composition and that of the entire Chicago metropolitan area, systematically depriving minorities of housing opportunities which resulted in "total ex-

16 *See*, Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. Rev. 398, 417, n. 106 (1979).

clusion." *Arlington Heights II*, 558 F.2d at 1286-1287, 1290, 1296.

The "fair share" theory adopted by the New Jersey Supreme Court, *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J.151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), and possibly by the New York Court of Appeals, *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975), provides a model for evaluating a municipality's good faith in providing its regional share of low-cost housing, yet the Second Circuit completely disregarded the regional factor in finding a *prima facie* case of disparate impact, which has led to the anomalous situation that the Town's past good faith in providing more than its fair share of housing for its region contributed significantly to a finding of Title VIII liability for racial segregation.[17] The proof showed that Huntington provided more than its fair share of public housing in the Nassau-Suffolk Standard Metropolitan Statistical Area ("SMSA"), which, on the basis of census data regarding place of employment versus place of residence, seems clearly to be the relevant region. *See*, Comment, *Developments-Zoning*, 91 Harv. L. Rev. 1427, 1645 (1978).

(2) In cases of alleged intra-town segregation, the Circuits have yet to reach accord on uniform standards for deciding when zoning ordinances have a segregative effect. The Second Circuit's decision substantially lowers the standard previously set by it in *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971), and the fact pattern here differs dramatically from the conscious segregative actions treated by the Third Circuit in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977), and the Eighth Circuit in *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

17 Under the Second Circuit's reasoning, a Town which receives a zoning application for property in an area of minority concentration, to facilitate construction of a low-income housing project, must deny the application or be sued for perpetuating segregation in violation of Title VIII. However, such a denial could be construed as "denying a dwelling because of race," 42 U.S.C. § 3604(a), and also lead to Title VIII liability.

In *Black Jack* and *Rizzo*, there was a causal relationship between the municipality's land-use policies and the racial housing patterns that developed. No such causal relationship was established in this case. Clearly, causes other than enforcement of zoning ordinances influence housing patterns, particularly economic factors such as income levels and employment opportunities in the wider region. Income cannot automatically be equated with race, *James v. Valtierra*, 402 U.S. 137 (1971); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Yet the Second Circuit makes no distinction between racial concentrations that arise from market influences and those caused by racially discriminatory restrictions imposed by zoning officials.

Moreover, the decision below has transmuted a municipality's duty to avoid causing segregation into an affirmative duty to encourage integration, despite the Second Circuit's earlier disavowal of the affirmative duty theory in *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974).[18] The significance of the affirmative duty theory is heightened in a case where plaintiffs' showing of intra-town or inter-town segregation is so weak. Although Huntington was not found by the trial Judge to be a segregated community, the Second Circuit nevertheless determined that the Matinecock Court project would have had a significant integrative effect. This finding was based upon appellees' 25 percent minority occupancy goal for the Matinecock Court project, a goal which was both arbitrary and speculative. Such a slender reed ought not be a basis on which to predicate Title VIII liability. Especially is this so, considering that multiple-family projects tend to take on the racial makeup of their surrounding area. *See, In re Malone*, 592 F. Supp. 1135, 1167 (E.D.Mo. 1984), *aff'd*, 794 F.2d 680 (8th Cir. 1986); *Otero v. New York Housing Auth.*, 484 F.2d 1125, 1135 (2d Cir. 1973). This case therefore raises the question of whether a *de minimis* showing of integrative effect should provide federal judges with

18 *See*, Kushner, *Fair Housing* (1983) at 394: "This 'less restrictive' or 'less segregative' alternative analysis [applied by the *Rizzo* Court] is a requirement that may prove difficult for many defendants to satisfy unless they have actively engaged in politics to achieve integration."

license to override all other zoning concerns and rezone property directly from the bench.

(3) The Circuits stand in need of guidance on the question of how to interpret statistical evidence in a Title VIII *prima facie* case of disparate impact. The two competing approaches are (a) to compare the *percentage* of minorities affected by a facially neutral policy against the percentage of minorities in the general population, or (b) to compare *absolute numbers* of minorities to numbers of whites affected by the challenged rule or policy. The Second Circuit has taken the extreme position that percentages alone are relevant, and has instructed trial judges to ignore absolute numbers. Appendix 26a. In accord with the Second Circuit are the Fourth Circuit, *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982); *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983 (4th Cir. 1984), and the Eighth Circuit, *United States v. City of Black Jack*, 508 F.2d 1188 (8th Cir. 1974).

On the other hand, the Seventh Circuit in *Arlington Heights II*, 558 F.2d 1283, 1291 (7th Cir. 1977), indicated that absolute numbers are important evidence concerning the significance of a discriminatory impact. In the Ninth Circuit, a District Court decision, *Keith v. Volpe*, 618 F.Supp. 1132 (C.D. Cal. 1985), relied upon absolute numbers to determine whether a municipality's failure to replace housing for low-income people displaced by freeway construction constituted disparate impact. The Sixth Circuit clearly favors consideration of absolute numbers in evaluating disparate impact under Title VIII, as reflected in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), and *Joseph Skilliken & Co. v. City of Toledo*, 528 F.2d 867 (6th Cir. 1975), *cert granted and remanded for further consideration*, 429 U.S. 1068 (1977), *aff'd on further consideration*, 558 F.2d 350 (6th Cir. 1977), *cert. denied*, 434 U.S. 985 (1977), *reh'g denied*, 434 U.S. 1051 (1978).

C. The Circuits Disagree About the Standard For Justifying A Discriminatory Effect

There exists major conflict among the Circuits as to the burden to be imposed upon a Title VIII defendant to justify its actions or policies, once a *prima facie* case, however defined, is established. In *Black Jack*, the Eighth Circuit required the governmental defendant to justify its conduct by a "compelling government interest" standard, but also required that plaintiff's interest in obtaining the housing opportunity be weighed against the government's interest in maintaining its ordinance. The Eighth Circuit's interest-balancing requirement thus parallels the "business necessity" test applied to the employer's justification in Title VII cases. *See, e.g., Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972).

The Seventh Circuit, in contrast, developed a four-factor analysis in *Arlington Heights II* that requires courts to weigh on a case-by-case basis (1) the strength of the demonstrated discriminatory effect; (2) evidence of the discriminatory intent; (3) the nature of defendant's interest in the proposed action; and (4) the nature of the relief sought. The Circuit Courts have recognized the value of the *Arlington Heights II* factors, but have differed about the significance to be accorded these factors. It is also unclear whether they are necessary to the *prima facie* case or should be applied only to the ultimate determination of liability.

In 1977, the Third Circuit devised its Title VIII test in *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The *Rizzo* Court was aware of the *Arlington Heights II* decision at the time it devised its standard, *Rizzo*, 564 F.2d at 126, but preferred to fashion its own test in a form different from both the Seventh and Eighth Circuit standards. *Rizzo* expressly rejected the "compelling interest" standard, concluding "that this heavy burden should be reserved not for Title VIII defendants, but for those who seek to justify denial of equal protection by *purposeful* discrimination." *Rizzo*, 564 F.2d at 148.

The Second Circuit adopted the Third Circuit's stringent requirement that a defendant present "*bona fide* and legitimate justifications for its action with no less discriminatory alternative available," *Resident Advisory Bd. v. Rizzo*, 564 F.2d at 149; Appendix 22a, but "refined" the justification standard by requiring the defendant to prove that "the proffered justification is of substantial concern such that it would justify a reasonable official in making this determination," Appendix 28a.[19] The Court then adopted the Seventh Circuit's "fourth prong" by striking a balance "more readily" in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing. Appendix 32a.[20]

Although the *Rizzo* Court expressly disavowed the "compelling interest" standard imposed by the *Black Jack* Court, the modified *Rizzo* test adopted by the Second Circuit seems to approach strict scrutiny in all but name.[21] It is unclear what real distinction there is between a "legitimate" and a "compelling" interest in the zoning context.[22] Zoning applications are usually decided by municipalities on the basis of a fairly conventional set of interests, and it makes little difference whether one

---

19 The Court then commented, "of course, a concern may be nonfrivolous, but may not be sufficient because it is not reflected in the record." Appendix 28a-29a.

20 The Court weighed this last consideration in favor of appellees; however, it apparently failed to consider that the appellees were asking the Town to provide zoning relief that was inconsistent with the Town's comprehensive plan, without the necessity of filing the required zoning application; such a request goes beyond mere restraint from interference.

21 The authors, in Comment, *Developments-Zoning*, 91 Harv. L. Rev. 1427, 1691 (1978), equate the test imposed by the Second Circuit with the compelling interest standard.

22 Perhaps determination of whether defendants' interest is "compelling" depends upon how heavily it weighs against plaintiffs' interest (*e.g.*, magnitude of discriminatory effect). *See*, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.—C.L. L. Rev. 128, 175-177 (1976). Yet the *Rizzo* test does not provide a balancing component to allow assessment of the relative interests of the two parties. *See*, Comment, *Justifying A Discriminatory Effect Under the Fair Housing Act: A Search For the Proper Standard*, 27 UCLA L. Rev. 398, 416-417 (1979).

chooses to call them "legitimate" or "compelling." On the other hand, the Second Circuit test derives its "bite" from the requirement that "no less discriminatory alternatives" are available to meet those "legitimate" interests. With the benefit of hindsight, courts can always suggest alternative approaches to the goals that local governments set out to achieve when they designate uses for land within their borders, while governmental defendants are placed in the impossible situation of trying to prove a negative—that there is "no alternative" to their policy. *See*, Judge Glasser's comment. Appendix 76a. Like strict scrutiny analysis, which is applied in constitutional cases where intentional discrimination is established, it is likely that the test applied by the Second Circuit to the defendant's justification in the non-intentional *Griggs* context will invariably prove "strict in theory, and fatal in fact."[23]

3. The Second Circuit Exceeded Its Remedial Powers By Directing A Site-Specific Rezoning

Notwithstanding that the Town properly zoned the subject parcel in the first instance, the Second Circuit has held that appellees effectively communicated their desire to rezone the property and the Town responded negatively, but that in any event it was unnecessary for the appellees to formally apply for a rezoning in order to obtain relief under Title VIII.

In directing a rezoning without the Town's first having had an opportunity to study and rule upon a formal zoning application, the Second Circuit exceeded its remedial powers by "restructuring the operation of local and state governmental entities" in the absence of a constitutional violation. *Hills v. Gautreaux*, 425 U.S. 284, 293 (1976).

Despite the Town's development of a sound comprehensive plan in furtherance of the constitutionally-recognized power duly delegated to it by the state, the Second Circuit has held that a party can develop property with utter disregard for a town's zoning code and comprehensive plan by simply acquiring an option on land of its choice and then seeking rezoning in

23 Schwartz, *The Fair Housing Act and "Discriminatory Effect": A New Perspective*, 11 Nova L. Rev. 71, 75, n. 26 (1986).

the federal courts under the guise of a Title VIII enforcement action.[24] The legislative history gives no hint of any congressional intent in adopting Title VIII to eviscerate local zoning powers in this fashion.

CONCLUSION

The Town of Huntington does not exclude multi-family dwellings from its territory, constructed the first public housing and has facilitated the construction of its fair share of low-income family units in the relevant region. Its code provision has never imposed any geographic restrictions on the Housing Authority, whose principal charge was the creation of low-income housing. In 1969, the zoning provision was broadened to permit private developers to construct multi-family dwellings in an urban renewal area, which desperately needed and subsequently received a needed infusion of investment capital, and the first two rezonings were to facilitate a Section 236 subsidized 262-unit cooperative apartment project and a luxury project in the urban renewal area. After urban renewal was replaced by the community development laws, the code provision was interpreted to apply to 12 widespread community development areas outside of the former urban renewal area and was actually applied to permit R-3M zoning for two private developments of low-income housing. The provision was not shown to have had any deleterious impact on low-income housing development.

With regard to the appellees' quest for R-3M zoning for their "Matinecock Court" site, the most favorable inferences that this record could permit (and to indulge them necessitates setting aside the trial Court's finding based upon the testimony of appellees' witnesses [Appendix 79a-80a]) are that appellees asked the Town Board to further broaden the language of the

24 Even where a New York court finds a zoning ordinance to be unconstitutional as applied to a particular parcel of real property, it is without jurisdiction to simply rezone the property; in the event that it does so, it will be deemed to have usurped the legislative function conferred by the state upon town boards. *Emjay Properties v. Town of Brookhaven*, 42 A.D.2d 907, 347 N.Y.S.2d 736 (2d Dept. 1973).

Town code and the Board declined to do so; and that it went further in its language than it needed in adopting a resolution asking HUD not to fund the appellees' project, by indicating (in what could only be a preliminary expression) that it was not favorably disposed toward R-3M zoning on the appellees' site.

In *Hills v. Gautreaux*, 425 U.S. 284, 305 (1976), this Court held that local governmental units retained the right to reject certain proposals "that are inconsistent with their housing assistance plans," and "to require that zoning and other land-use restrictions be adhered to by builders." The justification standard fixed by the Second Circuit has imposed Title VIII liability upon the Town of Huntington for exercising the very right that this Court affirmed in *Gautreaux*—to ask HUD to reject HHI's funding proposal as inconsistent with its housing assistance plan and its zoning regulations.

Probable jurisdiction of this appeal should be noted.

Dated: Melville, New York
May 25, 1988

/s/ RICHARD C. CAHN
Richard C. Cahn
Special Counsel,
Town of Huntington

CAHN WISHOD WISHOD & LAMB
Attorneys for Appellants
534 Broadhollow Road
CB-179
Melville, New York 11747
(516) 694-2300

On the brief:

Richard C. Cahn
Scott M. Karson
(We acknowledge with appreciation the contribution of Jeffrey Malkan, a student at CUNY Law School)

APPENDIX TABLE OF CONTENTS

PAGE

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED APRIL 5, 1988 ..... 1a

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 5, 1988 ..... 36a

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK FILED SEPTEMBER 9, 1987 ..... 38a

JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK FILED SEPTEMBER 16, 1987 ..... 87a

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT FILED APRIL 22, 1988 ..... 88a

STATUTES INVOLVED 91a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 794—August Term, 1987

(Argued March 3, 1988 Decided April 5, 1988)

Docket No. 87-7892

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Plaintiffs-Appellants,

—against—

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Defendants-Appellees.

Before:

KAUFMAN, OAKES, and NEWMAN,
Circuit Judges.

Appeal from judgment of the United States District Court for the Eastern District of New York (Glasser, *J.*), following a bench trial, holding that Huntington did not

violate Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985), by restricting private construction of multi-family housing units to a narrow urban renewal area and by refusing to amend the zoning code to permit multi-family housing outside the urban renewal area.

Reversed. Appellants are granted site-specific relief.

RICHARD F. BELLMAN, Steel, Bellman and Levine, P.C., New York, New York, (Lewis M. Steel, Miriam F. Clark, New York, Grover G. Hankins, General Counsel, National Association for the Advancement of Colored People, Baltimore, Maryland, *on the brief*), *for Plaintiffs-Appellants*.

RICHARD C. CAHN, Cahn, Wishod, Wishod, and Lamb, Melville, New York (Scott M. Carson, *on the brief*), *for Defendants-Appellees*.

KAUFMAN, *Circuit Judge*:

Twenty years ago, widespread racial segregation threatened to rip civil society asunder. In response, Congress adopted broad remedial provisions to promote integration. One such statute, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982 & Supp. III 1985) ("Fair Housing Act"), was enacted "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Today, we are called

upon to decide whether an overwhelmingly white suburb's zoning regulation, which restricts private multi-family housing projects to a largely minority "urban renewal area," and the Town Board's refusal to amend that ordinance to allow construction of subsidized housing in a white neighborhood violates the Fair Housing Act.

The Huntington Branch of the National Association for the Advancement of Colored People (NAACP), Housing Help, Inc. (HHI), and two black, low-income residents of Huntington appeal from an adverse judgment of the United States District Court for the Eastern District of New York (Glasser, *J.*), following a bench trial, in their suit against the Town of Huntington (the Town) and members of its Town Board. Appellants allege that the Town violated Title VIII by restricting private construction of multi-family housing to a narrow urban renewal area and by refusing to rezone the parcel outside this area where appellants wished to build multi-family housing.[1] Specifically, appellants sought to construct an integrated, multi-family subsidized apartment complex in Greenlawn/East Northport, a virtually all-white neighborhood. The Town's zoning ordinance, however, prohibited private construction of multi-family housing outside a small urban renewal zone in the Huntington Station neighborhood, which is 52% minority. Thus, appellants petitioned the Town to revise its code to accommodate the project. When the Town refused, appellants brought this class-action[2] to compel the change under Title VIII.

---

1 Appellants have abandoned their equal protection, 42 U.S.C. §§ 1982 and 1983, and state law claims pressed below.

2 The district court certified a class of "[a]ll black, Hispanic and lower income persons in need of lower cost housing opportunities in Huntington and surrounding areas and who would qualify for residency in the proposed Matinecock Court and other Section 8 projects

This dispute has been before this court before, in response to a district court determination that appellants lacked standing to bring their complaint. *Huntington Branch NAACP v. Town of Huntington*, 530 F. Supp. 838 (E.D.N.Y. 1981). We reversed, holding that standing could not be denied because of the lack of United States Department of Housing and Urban Development (HUD) Section 8 funds in a particular year. *Huntington Branch NAACP v. Town of Huntington (Huntington I)*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).[3] In so doing, we expressly held that, contrary to the Town's assertion, appellants were not required to exhaust local remedies by filing a formal application for rezoning. *Huntington I*, 689 F.2d at 393 n.3.

In the case currently appealed, *Huntington Branch NAACP v. Huntington*, 668 F. Supp. 762 (E.D.N.Y. 1987), the district court refused to invalidate the zoning restriction. The district judge, however, incorrectly employed an intent-based standard for the disparate impact claim asserted here both in analyzing the showing of effect and in scrutinizing the validity of the Town's reasons for rejection. Accordingly, we reverse and, finding a Title VIII violation, grant appellants' request for site-specific relief. Although prior opinions exhaustively document the facts, a brief statement of the pertinent points will aid in the understanding of this case.

---

in Huntington, and who seek to reside in and insure opportunity for racially and economically integrated housing in Huntington." "Section 8" refers to a federal program that provides subsidies for newly-constructed and substantially-rehabilitated housing. 42 U.S.C. § 1437f (1982 and Supp. III 1985).

3 Although the original complaint also named HUD as well as the Huntington defendants, appellants have not challenged the dismissal of the federal defendant.

Huntington is a town of approximately 200,000 people located in the northwest corner of Suffolk County, New York. In 1980, 95% of its residents were white. Blacks comprised only 3.35% of the Town's population and were concentrated in areas known as Huntington Station and South Greenlawn. Specifically, 43% of the total black population lived in four census tracts in Huntington Station and 27% in two census tracts in the South Greenlawn area. Outside these two neighborhoods, the Town's population was overwhelmingly white. Of the 48 census tracts in the Town in 1980, 30 contained black populations of less than 1%.

The district court found that the Town has a shortage of affordable rental housing for low and moderate-income households. The Town's Housing Assistance Plan (HAP), which is adopted by the Town Board and filed with HUD as part of Huntington's application for federal community development funds, reveals that the impact of this shortage is three times greater on blacks than on the overall population. Under the 1982-1985 HAP, for example, 7% of all Huntington families required subsidized housing, while 24% of black families needed such housing.

In addition, a disproportionately large percentage of families in existing subsidized projects are minority. In Gateway Gardens, a public housing project built in 1967, 38 of 40 units were occupied by blacks and Hispanics in 1984. Seventy-four percent of those on the project's waiting list were minority. In Whitman Village, a 260-unit HUD subsidized development built in 1971, 56% of the families were minority in 1984. Lincoln Manor, which was built in 1980, is a 30-unit HUD Section 8 project. Thirty percent of the households and 45% of those on the waiting list were minority in 1984. Under a HUD Section 8 pro-

gram, lower income families can obtain certificates to supplement their rent. Each family, however, must locate its own apartment. In January 1984, 68% of families holding certificates and 61% of those on the waiting list were minority.

Although a disproportionate number of minorities need low-cost housing, the Town has attempted to limit minority occupancy in subsidized housing projects. Michael Miness, the Director of Huntington's Community Development agency and responsible for developing the Town's low-cost housing, and Angela Sutton, Executive Director of the Huntington Housing Authority, repeatedly told whites opposing the Lincoln Manor project that they would impose a racial quota on occupancy. When HUD reviewed the project's management plan which established 5% minority occupancy, however, it advised the Huntington Housing Authority that it would not permit a racial quota at Lincoln Manor. The Town similarly attempted to impose racial quotas on occupancy at a proposed 150-unit subsidized housing project in Huntington Station on the Melville Industrial Associates (MIA) site. When Alan H. Wiener, HUD's Area Director, wrote Kenneth C. Butterfield, Town Supervisor, that "limitations on minority occupancy of housing on the Huntington Station site are not justifiable and will not be permitted," (Letter of June 19, 1981, E-18), the Town Board unanimously passed a resolution withdrawing its support for the project because they could not "ensure a particular ethnic mix." (Huntington Town Board Resolution re: Huntington Station Urban Renewal Project, June 23, 1981, E-17.)

Under the Town's zoning ordinance, multi-family housing is permitted only in an "R-3M Apartment District." The relevant portion of section 198-20(A) provides:

Use regulations. In the R-3M Apartment District, a building or premises shall be used only for the following purposes:

(1) Any use permitted in the R-80, R-15 and R-5 Residence Districts.

(2) Multiple-family dwellings which constitute an approved public housing project to be owned, maintained and operated by the Housing Authority of the Town of Huntington.

(3) Multiple-family dwellings where such dwellings constitute an element in a formally approved land use or a use plan for all or part of an urban renewal area which has been designated as such under the provisions of Article 15 of the General Municipal Law.

On its face, then, this provision limits private construction of multi-family housing to the Town's urban renewal area, where 52% of the residents are minority.[4] It does permit the Huntington Housing Authority (HHA) to build multi-family housing townwide. But HHA's only project, Gateway Gardens, is in the urban renewal zone. The private housing projects are also in or nearby the urban renewal area. Whitman Village is adjacent to Gateway Gardens in census blocks that are over 40% minority. Lincoln Manor,

4 The Town claims that, in rezoning the Lincoln Manor site in 1978, the Town Board relied on a broadened interpretation of the R-3M provision. That legal opinion was contained in a letter from Town Attorney Ronald Glickman to Michael Miness, the Director of the Huntington Community Development Agency dated August 22, 1978. Glickman wrote that the community development program superseded the urban renewal designations, so that "so long as the subject premises is within a community development area" it can be rezoned as R-3M property. The Town claims it informed HHI of this interpretation. The letter, however, was not made public until 1984 in the midst of this litigation.

only a few blocks from the projects in the urban renewal area, is also in a racially impacted census block.

The Town's zoning ordinance also includes a special category for multi-family housing for senior citizens called "R-RM Retirement Community District." Only one such development—Paumanack Village—has been built in Huntington. It is the only multi-family housing for low income people which is situated in an overwhelmingly white neighborhood. The development itself is largely white, having a black occupancy of 3%.

Only one vacant parcel of land in Huntington currently is zoned R-3M and thus would be eligible for the appellants' proposed development: the MIA site, which is at the northeast corner of Broadway and New York Avenue, is partially zoned C-6 and partially zoned R-3M. The Town in 1980 requested pre-approval for 150 units of Section 8 housing on this site.[5]

In response to the great need for subsidized housing in the Town, HHI decided to sponsor an integrated housing project for low-income families. HHI determined that the project could foster racial integration only if it were located in a white neighborhood outside the Huntington Station and South Greenlawn areas. This decision eliminated consideration of the MIA site, the only vacant R-3M property located in the urban renewal area.

In its effort to create racially integrated, low-cost housing, HHI actively sought the assistance of Town officials. Specifically, HHI's Executive Director, Marianne Garvin,

5 Although pre-approval was granted, the project was delayed by community opposition and by an attempt by Butterfield to reserve 30 units for the elderly and to set a limit on black participation of 10%. In June 1981, Alan Weiner, HUD's Area Manager, suspended pre-approval.

and HHI Board members met repeatedly with Michael Miness. In response to Miness's suggestion that HHI pursue rehabilitating existing structures before focussing on new construction, HHI commissioned a study in 1979 to assess whether any of the vacant schools were suitable for the housing project. After narrowing the possibilities to the Green Meadow School, HHI determined that this location was inappropriate for a low-cost housing development. Throughout 1979, Miness assured HHI representatives that existing zoning should not impede their efforts because the Town Board would amend the zoning ordinance if it supported the organization's project.

After a lengthy search, HHI determined that a 14.8 acre parcel located at the corner of Elwood and Pulaski Roads in the Town was well suited for a 162-unit housing project. This flat, largely cleared and well-drained property was near public transportation, shopping and other services, and immediately adjacent to schools.

Ninety-eight percent of the population within a one-mile radius of the site is white. HHI set a goal of 25% minority occupants. The district court found that "a significant percentage of the tenants [at Matinecock Court] would have belonged to minority groups." *Huntington*, 668 F. Supp. at 785. HHI officials determined that the property was economically feasible and offered a lengthy option period.

Prior to purchasing the option for the property, Garvin asked Miness to visit the property and evaluate it. Garvin testified that, although Miness told Garvin he would not give an opinion before HHI secured an option, he assured her that the property's R-40 designation (single family homes on one-acre lots) should not be an obstacle because

the Town Board, if it supported the project, would simply amend the zoning ordinance.

HHI obtained its option to purchase the Elwood-Pulaski parcel on January 23, 1980. Garvin again called Miness and invited him to visit the site. She testified that he responded that he was familiar with the property and believed it was a good location for development.

Throughout 1980, HHI sought to advance its project by gaining the approval of the Town Board to rezone the property to R-3M from its R-40 designation. The opinion below recites the multitudinous disputes which color the parties' versions of the events of those months, especially concerning the apparently "illegal" closed meeting between the Board and HHI on February 22, 1980. Certain facts, however, are not in contention. Robert Ralph, a director of HHI, addressed the Town Board on February 26, 1980, at a public hearing. The district court found that he filed a document requesting "a commitment by the Town to amend the zoning ordinance to allow multi-family rental construction by a private developer." *Huntington*, 668 F. Supp. at 784 (quoting Presentation to the Huntington Town Board at the Community Development Block Grant Hearing 2 (February 26, 1980)). In August 1980, HHI and National Housing Partnership, an owner-manager of federally subsidized housing, filed a joint application with HUD for Section 8 funding for the project.

At the time HHI applied for the Section 8 funding, Huntington had a Housing Assistance Plan, which had been approved by HUD. Pursuant to the provisions of the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-20 (1982 & Supp. III 1985), when a town has such a plan, HUD must refer a Section 8 application to the Town for comment. In an October 14, 1980, letter to

Alan H. Weiner, HUD Area Manager, Town Supervisor Kenneth C. Butterfield set forth seven reasons why Huntington opposed the project. It reads, in pertinent part, as follows:

> The Town's professional staff in the Planning, Legal and Community Development Departments have reviewed the proposal and have submitted the following comments:
>
> 1. The HUD-approved Housing Assistance Plan (both the three-year goal submitted with the Community Development Block Grant 1979-80 application and the annual goal submitted with the 1980-1981 Community Development Block Grant) contains no "new construction" units as a program goal.
>
> 2. The plan for development cannot be carried out within the existing single family R-40 (1 acre) zoning.
>
> 3. The development is located at the intersection of two heavily trafficked streets.
>
> 4. The site plan presents a poor parking plan in terms of location with respect to the units, substandard in size and the lack of streets results in very poor fire protection access.
>
> 5. The development is located adjacent to both the Long Island Railroad as well as a LILCO substation. This is in addition to the heavy traffic conditions.
>
> 6. The site plan shows recreation and/or play areas very inadequate for the number and type of dwelling units being proposed.

7. The three and four-bedroom units are quite undersized; have poor layout; bedrooms are much too small; living space is unrealistic; no storage; one full and two half-baths for a family of 6 to 8 is not realistic.

In conclusion, I do not recommend HUD approval of this proposal based on the material reviewed and the comments presented above.

When the proposal became public, substantial community opposition developed. A group called the Concerned Citizens Association was formed, and a petition containing 4,100 signatures against the proposal was submitted to the Town Board. A protest meeting in November drew about 2,000 persons. Supervisor Butterfield was the principal speaker and assured the audience of his opposition to the project. Matinecock Court came before the Town Board at a meeting on January 6, 1981. The Board rejected the proposed zoning change and adopted the following resolution:

WHEREAS, it has been proposed by HOUSING HELP, INC., a private non-profit group, that Huntington's zoning code be changed in order to build 162 federally-subsidized apartments for low to moderate income people at Elwood and Pulaski Roads in the Elwood section of the Town of Huntington; and

WHEREAS, the Town Board has studied the various aspects of the proposal for a zoning change for 162 apartments at the said location of Elwood and Pulaski Roads;

NOW, THEREFORE,

THE TOWN BOARD finds that although favoring housing for the senior citizens and others, in appropriate areas, that the location referred to herein is not an appropriate location due to lack of transportation, traffic hazard and disruption of the existing residential patterns in the Elwood area and requests that the Department of Housing and Urban Development (HUD) reject the application by HOUSING HELP, INC.

Huntington Town Board Resolution re: Housing at Elwood and Pulaski Roads (January 6, 1981).

The district court based its refusal to order rezoning on three alternative grounds: (1) appellants never formally applied for rezoning; (2) even if they had applied, they failed to make the requisite prima facie showing of discriminatory effect; and (3) even if they had demonstrated discriminatory effect, the city had rebutted it by articulating legitimate, non-pretextual justifications. We now consider each ground separately.

The district court, in its first alternative holding, found that appellants failed to exhaust their available remedies because they did not formally apply to rezone their parcel. Specifically, Judge Glasser noted that HHI never filed an application to rezone its option property to R-3M status. Relying on *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979), he held that appellants must demonstrate that they actually applied. Quoting from testimony of Robert Ralph, an HHI director, and Marianne Garvin, HHI's Executive Director, he concluded that no formal application was ever in fact made. *Huntington*, 668 F. Supp. at 784-85. This court has already rejected this reasoning. *Huntington I*, 689 F.2d at 393 n.3.

Despite the myriad of factual disputes surrounding HHI's dealings with the Town Board, two facts are crystal clear: HHI requested the Town Board to amend the code

to allow R-3M zoning townwide at a formal meeting on February 26, 1980, and the Board, in its resolution of January 6, 1981, deemed this application a "propos[al] . . . that Huntington's zoning code be changed in order to build 162 federally-subsidized apartments for low to moderate income people at Elwood and Pulaski Roads. . . ." During the numerous contacts with HHI directors and members, Town officials never mentioned that HHI should be pursuing a different application process. Both parties thus clearly understood that an application for a zoning change had been made. As this court determined in *Huntington I*, no further petitions, formal or informal, were necessary. *Huntington I*, 689 F.2d. at 393 n.3. Moreover, the Town's refusal to amend the zoning code rendered meaningless a request to change the zoning on the Elwood-Pulaski property, as R-3M classifications were reserved for property within the urban renewal area, and there were no other multi-family housing designations.

In its second holding, the court adopted the four-prong disparate impact test set out in *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (*Arlington Heights II*), and concluded that, even if appellants applied for a rezoning change, they had failed to make out a prima facie case. The court considered:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for

> members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Huntington, 668 F. Supp. at 781 (quoting *Arlington Heights II*, 558 F.2d at 1290). On the first prong, the court found that the showing of discriminatory effect was "not particularly strong." *Huntington*, 668 F. Supp. at 786. Although the judge held that a shortage of rental housing existed, that a disproportionately large percentage of the households using subsidized rental units are minority, and, accordingly, that a "significant percentage" of Matinecock Court tenants would be minority, 668 F. Supp. at 785, he compared the larger absolute number of white poor (22,160) with minority poor (3,671) and concluded that the beneficiaries "might not come disproportionately from minority groups." *Huntington*, 668 F. Supp. at 786. On the second factor, Judge Glasser found no proof of segregative intent, deeming this a plus in the Town's favor. In so holding, he determined that appellants had failed to prove that the Town was motivated by segregative intent when it confined subsidized housing to the urban renewal area. The third prong of *Arlington Heights II*, he concluded, was satisfied by "legitimate, nondiscriminatory reasons for [the Town's] conduct." *Huntington*, 668 F. Supp. at 786. He deemed the fourth factor to cut in favor of appellants because they were not asking the Town to provide housing. Nevertheless, because the first three factors weighed in favor of appellees, he held that the appellants had failed to demonstrate a prima facie case.

In its third rationale, the court applied the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as a final determination on the merits for Title VII

disparate treatment cases. According to this formula, if plaintiffs establish a prima facie case of disparate treatment, the "burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. If defendants meet this burden, plaintiffs must show that the legitimate justifications offered were pretextual and not the employer's true reasons. *McDonnell Douglas*, 411 U.S. at 804. Applying this test, the court below found that, even if appellants had demonstrated a prima facie showing of discriminatory effect, the Town's justifications for rejecting the project were legitimate and nondiscriminatory reasons which "have not been exposed as pretextual." *Huntington*, 668 F. Supp. at 787.

We find it convenient to discuss Judge Glasser's second and third holdings together. In considering them, we start by pointing out that this case requires what has been called "disparate impact" or "disparate effects" analysis, not "disparate treatment" analysis. A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group. *Sobel v. Yeshiva Univ.*, No. 87-7373, slip op. 1457, 1478 (2d Cir. Feb. 4, 1988). Disparate treatment analysis, on the other hand, involves differential treatment of similarly situated persons or groups. The line is not always a bright one, *e.g.*, *Sobel*, slip op. at 1477-1480, but does adequately delineate two very different kinds of discrimination claims.

Here, appellees would collapse the distinction between disparate impact and disparate treatment by characterizing this as a "mixed" impact and treatment case. Thus, they argue, "treatment" analysis should be applied to the Town's refusal to rezone the Matinecock Court site, while

"impact" analysis should be applied to the zoning ordinance's restriction of multi-family housing to the urban renewal area. Under appellees' methodology, however, every disparate impact case would include a disparate treatment component. This cannot be the case. There is always some discrete event (refusal to rezone property, refusal to hire someone because he did not graduate from high school) which touches off litigation challenging a neutral rule or policy.

The prima facie standard for Title VIII disparate impact cases involving public defendants is a question of first impression in this circuit. In *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir.), *rehearing denied*, 517 F.2d 918 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975), a divided panel, considering a Title VIII case against a private defendant, doubted the relevance of the methodology used in Title VII litigation. 509 F.2d at 1114. Since then, however, we have pointedly accepted the relevance of Title VII cases to Title VIII cases. *See United States v. Starrett City Assoc.*, No. 87-6132, slip op. 6515, 6525 (2d Cir. Mar. 1, 1988); *Robinson*, 610 F.2d at 1036-37. Thus, even if the views expressed in *Lefrak* still apply in a Title VIII case against a private defendant, a matter of considerable uncertainty, the disparate impact approach of Title VII cases is fully applicable to this Title VIII case brought against a public defendant.

Under disparate impact analysis, as other circuits have recognized, a prima facie case is established by showing that the challenged practice of the defendant "actually or predictably results in racial discrimination; in other words that it has a discriminatory effect." *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The plaintiff need not

show that the decision complained of was made with discriminatory intent. *United States v. Yonkers Board of Education*,[6] Nos. 86-6136, 86-6138, 86-6156, slip op. 6153, 6237 (2d Cir. December 28, 1987); *Robinson*, 610 F.2d at 1036-38; *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976); *Black Jack*, 508 F.2d at 1184-85. Refusal to require intent in disparate impact cases is entirely consistent with our prior decisions. *See Starrett City*, slip op. at 6523; *Yonkers*, slip op. at 6237; *Robinson*, 610 F.2d at 1036-38. In determining whether discriminatory effect is sufficient, we look to congressional purpose, as gleaned from the legislative history of Title VIII, related Title VII jurisprudence, and practical concerns. Although none of these considerations is alone determinative, taken together they strongly suggest that discriminatory impact alone violates Title VIII.

The Act's stated purpose to end discrimination requires a discriminatory effect standard; an intent requirement would strip the statute of all impact on de facto segregation. Comment, *Justifying a Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard*, 27 UCLA L. Rev. 398, 406 (1979) (hereafter UCLA Comment). Congress appears not to have resolved this precise question. Nonetheless, the legislative history provides some indication that an intent standard was not contemplated. The *Rizzo* court attached significance to the Senate's rejection of an amendment that would have required

6 In *Yonkers*, this court affirmed the district court's finding that the Town purposefully maintained housing and educational segregation and thus violated the equal protection clause of the Fourteenth Amendment. *Yonkers*, slip op. at 6240. *See also Taylor v. Board of Education*, 191 F. Supp. 181 (S.D.N.Y.), *aff'd*, 294 F.2d 36 (2d Cir. 1961).

"proof of discriminatory intent to succeed in establishing a Title VIII claim." *Rizzo*, 564 F.2d at 147. The amendment, however, was far less sweeping than *Rizzo* suggests because it applied only to a single-family owner-occupied house. UCLA Comment, 27 UCLA L. Rev. at 406-7 n.45. Nevertheless, its rejection does underscore congressional willingness to broaden Title VIII to encompass segregation resulting from the application of facially neutral rules, even in the absence of discriminatory intent.

More persuasive is the parallel between Title VII and Title VIII noted by both courts and commentators. *E.g.*, *Starrett City*, slip op. at 6525; *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Rizzo*, 564 F.2d at 146-48; *Arlington Heights II*, 558 F.2d at 1288-89; *United States v. Hunter*, 459 F.2d 205, 216-17 & n.12 (4th Cir.), *cert. denied*, 409 U.S. 864 (1972); Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.-C.L. L. Rev. 128, 158-60 (1976). The two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination; the Supreme Court has held that both statutes must be construed expansively to implement that goal. *See, e.g., Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-12 (1972) (Fair Housing Act must be generously construed to foster integration); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-36 (1971) (Title VII should be interpreted broadly to achieve equal employment opportunity). Courts and commentators have observed that the two statutes require similar proof to establish a violation. *See, e.g., Rizzo*, 564 F.2d at 146-48; *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221, 226-27 (5th Cir. 1971); *Hunter*, 459 F.2d at 217-18; Schwartz, *The Fair Housing Act and "Discriminatory Effect": A New Perspective*, 11 Nova L. J. 71, 73 (1987); Harv. C.R.-C.L. L. Rev. Comment at 158-60. Thus, just

as the Supreme Court held that Title VII is violated by a showing of discriminatory effect, *Griggs*, 401 U.S. at 429-36, we hold that a Title VIII violation can be established without proof of discriminatory intent.

Practical concerns also militate against inclusion of intent in any disparate impact analysis. First, as this court noted in *Robinson*, "clever men may easily conceal their motivations." 610 F.2d at 1043 (quoting *Black Jack*, 508 F.2d at 1185. This is especially persuasive in disparate impact cases where a facially neutral rule is being challenged. Often, such rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied. Second, inclusion of intent undermines the trial judge's inquiry into the *impact* of an action. The lower court's insistence on probing the "pretextual" nature of appellees' justifications vividly demonstrates the extent to which an intent-based standard can infect an analysis and draw it away from its proper focus. Accordingly, we will not require proof of discriminatory intent to establish a prima facie disparate impact case under Title VIII.

Confusion concerning the content of a prima facie disparate impact case under Title VIII has been engendered by the tendency of some courts to consider factors normally advanced as part of a defendant's justification for its challenged action in assessing whether the plaintiff has established a prima facie case. That appears to have occurred in this case when Judge Glasser analyzed the factors set forth in *Arlington Heights II* in the course of concluding that a prima facie case was not established. *See also Keith v. Volpe*, 618 F. Supp. 1132, 1148 (C.D. Cal. 1985) (Pregerson, *C.J.*, sitting by designation). Though, as will shortly appear, we are not persuaded to adopt pre-

cisely the formulation of the *Arlington Heights II* factors, we agree with the Third Circuit that factors such as those mentioned in *Arlington Heights II* are to be considered in a final determination on the merits rather than as a requirement for a prima facie case. *See Rizzo*, 564 F.2d at 148 n.32. Nothing in *Arlington Heights II* indicates the court saw its test as anything but a final determination on the merits. Furthermore, treating the four factors as steps necessary to make out a prima facie case places too onerous a burden on appellants. The legislative history of the Fair Housing Act, although sparse, argues persuasively against so daunting a prima facie standard.

As Senator Mondale, the bill's author, said, the proposed law was designed to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968) *quoted in Trafficante*, 409 U.S. at 211. In *Trafficante*, the Supreme Court held that Title VIII should be broadly interpreted to fulfill this congressional mandate. 409 U.S. at 212. Moreover, both the majority and the thoughtful dissent in a recent Title VIII case in this circuit, *Starrett City*, agree: Congress intended that broad application of the anti-discrimination provisions would ultimately result in residential integration. Employing the test in *Arlington Heights II* as a prima facie hurdle would cripple Title VIII.

Once a prima facie case of adverse impact is presented, as occurred here, the inquiry turns to the standard to be applied in determining whether the defendant can nonetheless avoid liability under Title VIII. The Third Circuit in *Rizzo* and the Seventh Circuit in *Arlington Heights II* have both made useful contributions to this inquiry. Both circuits essentially recognize that in the end there must be a weighing of the adverse impact against the defendant's

justification. As phrased by the Third Circuit, the defendant must prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect. *Rizzo*, 564 F.2d at 148-49. We agree with that formulation. Furthermore, according to the Third Circuit, "Title VIII criteria [would] emerge, then, on a case-by-case basis." 564 F.2d at 149. The Seventh Circuit adds two other factors that can affect the ultimate determination on the merits. One factor is whether there is any evidence of discriminatory intent on the part of the defendant. Though we have ruled that such intent is not a requirement of the plaintiff's prima facie case, there can be little doubt that if evidence of such intent is presented, that evidence would weigh heavily on the plaintiff's side of the ultimate balance. The other factor is whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build. In the latter circumstance, a defendant would normally have to establish a somewhat more substantial justification for its adverse action than would be required if the defendant were defending its decision not to build.

In this case, we are obliged to refine the standard for assessing a Title VIII defendant's justification somewhat beyond what was said in either *Rizzo* or *Arlington Heights II*. In *Rizzo*, two of the defendants offered no justification for the adverse decision, 564 F.2d at 149, and the municipal defendant offered only the entirely unacceptable apprehension of violence, 564 F.2d at 150. The Third Circuit therefore did not have anything of substance to weigh on the defendants' side. In *Arlington Heights II*, the consideration of the defendant's justification scarcely moved past inquiring whether the municipal defendant was acting

within the scope of zoning authority granted by state law. 558 F.2d at 1293.

In considering the defendant's justification, we start with the framework of Title VII analysis. When an employer's facially neutral rule is shown to have a racially disproportionate effect on job applicants, that rule must be shown to be substantially related to job performance. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In a zoning case, the facially neutral rule is the provision of the zoning ordinance that bars the applicant and, in doing so, exerts a racially disproportionate effect on minorities. The difficulty, however, is that in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related. A town's preference to maintain a particular zoning category for particular sections of the community is normally based on a variety of circumstances. The complexity of the considerations, however, does not relieve a court of the obligation to assess whatever justifications the town advances and weigh them carefully against the degree of adverse effect the plaintiff has shown. Though a town's interests in zoning requirements are substantial, *see Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), they cannot, consistently with Title VIII, automatically outweigh significant disparate effects.

A district court's findings of fact may not be set aside "unless clearly erroneous." Fed. R. Civ. P. 52(a); *Yonkers*, slip op. at 6238-39. But Rule 52(a), the Supreme Court has held, "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law, or a finding of fact that is predicated on a misunderstanding of the governing

rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). With these principles in mind, we review Judge Glasser's findings in two areas:[7] the strength of the discriminatory effect and the import of the Town's justifications.

The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation. *Arlington Heights II*, 558 F.2d at 1290. In analyzing Huntington's restrictive zoning, however, the lower court concentrated on the harm to blacks as a group, and failed to consider the segregative effect of maintaining a zoning ordinance that restricts private multi-family housing to an area with a high minority concentration. Yet, recognizing this second form of effect advances the principal purpose of Title VIII to promote, "open, integrated residential housing patterns." *Otero v. New York Housing Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

Seventy percent of Huntington's black population reside in Huntington Station and South Greenlawn. Matinecock Court, with its goal of 25% minorities, would begin desegregating a neighborhood which is currently 98% white. Indeed, the district court found that a "significant percentage of the tenants" at Matinecock Court would belong to minority groups. *Huntington*, 668 F. Supp. at 785. The court, however, failed to take the logical next step and

7 Because we hold that we will no longer require a showing of discriminatory intent in Title VIII disparate impact claims, we do not review Judge Glasser's findings on intent to discriminate.

find that the refusal to permit projects outside the urban renewal area with its high concentration of minorities reinforced racial segregation in housing.[8] This was erroneous. Similarly, the district court found that the Town has a shortage of rental housing affordable for low and moderate-income households, that a "disproportionately" large percentage of the households using subsidized rental units are minority citizens, and that a disproportionately large number of minorities are on the waiting lists for subsidized housing and existing Section 8 certificates. *Huntington*, 668 F. Supp. at 785. But it failed to recognize that Huntington's zoning ordinance, which restricts private construction of multi-family housing to the largely minority urban renewal area, impedes integration by restricting low-income housing needed by minorities to an area already 52% minority.[9] We thus find that Huntington's refusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the urban renewal area significantly perpetuated segregation in the Town.

On the question of harm to blacks as a group, the district court emphasized that 22,160 whites and 3,671 minor-

8 There would likely also be a desegregative effect on Huntington Township as a whole in comparison to the region, given the tight housing market throughout the area. *See, e.g., Black Jack*, 508 F.2d at 1186; *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 810 (5th Cir. 1974). Appellees assert that there is no statistical disparity between the Town and its surrounding region, the Nassau-Suffolk Standard Metropolitan Statistical Area. We need not reach this question, however, because we find sufficient desegregative impact within Huntington itself from the project.

9 The lower court opinion's sole reference to the zoning ordinance's perpetuation of segregation is contained in its discussion of the Town's discriminatory intent. *Huntington*, 668 F. Supp. at 786. Judge Glasser failed to consider the impact of the zoning ordinance on the perpetuation of segregation.

ities had incomes below 200% of the poverty line, a cutoff close to the Huntington Housing Authority's qualification standards. *Huntington*, 668 F. Supp. at 786. Thus, the district court focussed on the greater absolute number of poor whites compared with indigent minorities in Huntington. The district court, however, did not analyze the disproportionate burden on minorities as required by *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).[10] By relying on absolute numbers rather than on proportional statistics, the district court significantly underestimated the disproportionate impact of the Town's policy. Thus, the district court perceived facts through a misapprehension of the applicable law and we must make our own findings at least as to the significance of the undisputed underlying facts. *Bose*, 466 U.S. at 501.

The parties have stipulated that 28% of minorities in Huntington and 11% of whites have incomes below 200% of the poverty line. What they dispute is the meaning of these statistics. Judge Glasser found that, as the Town contends, there is no showing of discriminatory effect because a majority of the victims are white. We disagree for reasons analogous to those the Supreme Court enumerated in *Griggs*. The disparity is of a magnitude similar to that in *Griggs*, where the Court found discriminatory an employer's policy of hiring only high school graduates because 12% of black males in North Carolina had high school diplomas while 34% of white males were high school graduates. But the plaintiffs presented even stronger evidence reflecting the disparate impact of preventing the project from proceeding. Under the Hun-

10 Although the *Arlington Heights II* court compared the absolute numbers of blacks and whites affected by the Village's refusal to rezone, it also examined whether the decision had a disproportionate impact on nonwhite people. 558 F.2d at 1291; *see also Rizzo*, 564 F.2d at 149; *Black Jack*, 508 F.2d at 1186.

tington HAP for 1982-1985, 7% of all Huntington families needed subsidized housing, while 24% of the black families needed such housing. In addition, minorities constitute a far greater percentage of those currently occupying subsidized rental projects compared to their percentage in the Town's population. Similarly, a disproportionately high percentage (60%) of families holding Section 8 certificates from the Housing Authority to their rents are minorities, and an equally disproportionate percentage (61%) of those on the waiting list for such certificates are minorities. Therefore, we conclude that the failure to rezone the Matinecock Court site had a substantial adverse impact on minorities.[11]

In sum, we find that the disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect—far more than the *Rizzo* test would require. Thus, we must consider the Town's asserted justifications.

Once a plaintiff has made a prima facie showing of discriminatory effect, a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available. *Rizzo*, 564 F.2d at 149. Following *McDonnell Douglas*, a disparate treatment

11 Appellees correctly note that Title VII case law subsequent to *Griggs* requires some showing that statistics based on the general population bear a proven relationship to the actual applicant flow. *New York City Transp. Auth. v. Beazer*, 440 U.S. 568 (1979); *Townsend v. Nassau County Medical Center*, 558 F.2d 117 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978). The district court in this case, however, made a factual finding that a "significant" percentage of Matinecock Court tenants would be minority. *Huntington*, 668 F. Supp. at 785. Indeed, the court went further in noting that minority persons made up 74% of the Gateway Gardens waiting list, 45% of the Lincoln Manor waiting list and 61% of the waiting list for existing Section 8 certificates. *Huntington*, 668 F. Supp. at 785.

case, Judge Glasser held that if appellees articulated a legitimate, nondiscriminatory reason for their conduct, appellants must show that the reason is a "pretext." *Huntington*, 668 F. Supp. at 782. He went on to list the seven reasons in Butterfield's October 14, 1980, letter to HUD and found them "legitimate, nondiscriminatory" reasons which "have not been exposed as pretextual." *Huntington*, 668 F. Supp. at 787. The *McDonnell Douglas* test, however, is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here. No circuit, in an impact case, has required plaintiffs to prove that defendants' justifications were pretextual. In *Black Jack*, 508 F.2d at 1185, for example, the court required defendants to show that their conduct was necessary to promote a "compelling governmental interest." The Third Circuit in *Rizzo* rejected this standard for its own test of legitimate and bona fide concerns.

The *Rizzo* approach has two components: (1) whether the reasons are bona fide and legitimate; and (2) whether any less discriminatory alternative can serve those ends. For analytical ease, the second prong should be considered first. Concerns can usually be divided between "plan-specific" justifications and those which are "site-specific." "Plan-specific" problems can be resolved by the less discriminatory alternative of requiring reasonable design modifications. "Site-specific" justifications, however, would usually survive this prong of the test. Those remaining reasons are then scrutinized to determine if they are legitimate and bona fide. By that, we do not intend to devise a search for pretext. Rather, the inquiry is whether the proffered justification is of substantial concern such that it would justify a reasonable official in making this determination. Of course, a concern may be non-

frivolous, but may not be sufficient because it is not reflected in the record.

Appellants challenge both the ordinance which restricts privately-built multi-family housing to the urban renewal area and the Town Board's decision to refuse to rezone the Elwood-Pulaski site. All the parties and the district court judge, however, focussed on the latter issue. Indeed, appellees below simply relied on the existence of the Housing Assistance Plan and the zoning ordinance and failed to present any substantial evidence indicating a significant interest in limiting private developers to the urban renewal area. On appeal, appellees now contend that the ordinance is designed to encourage private developers to build in the deteriorated area of Huntington Station. Although we believe that the Town's failure to raise this argument below precludes its consideration here, we briefly address this contention. The Town asserts that limiting multi-family development to the urban renewal area will encourage restoration of the neighborhood because, otherwise, developers will choose to build in the outlying areas and will bypass the zone. The Town's goal, however, can be achieved by less discriminatory means, by encouraging development in the urban renewal area with tax incentives or abatements. The Town may assert that this is less effective, but it may actually be more so.

Developers are not wed to building in Huntington; they are filling a perceived economic void. Developments inside the urban renewal area and outside it are not fungible. Rather, developers prevented from building outside the urban renewal area will more likely build in another town, not the urban renewal area. Huntington incorrectly assumes that developers limit their area of interest by political subdivision. In fact, the decision where to build is

much more complex. Hence, if the Town wishes to encourage growth in the urban renewal area, it should do so directly through incentives which would have a less discriminatory impact on the Town.

We turn next to the Town's reasons rejecting the Elwood-Pulaski site. The 1980 letter written by Town Supervisor Butterfield detailed seven justifications for the Town's refusal to rezone: (1) inconsistency with the Town's Housing Assistance Plan; (2) inconsistency with zoning; (3) traffic considerations; (4) parking and fire protection problems; (5) proximity to the railroad and Long Island Lighting Company substation; (6) inadequate recreation and play areas; and (7) undersized and unrealistic units. As the judge below noted, the first two beg the question because appellants are challenging the Town's zoning ordinance. *Huntington*, 668 F. Supp. at 786. More significantly, as we have already indicated, the Town simply relied on the existence of the Housing Assistance Plan and the zoning ordinance and failed to present any substantial evidence indicating why precluding plaintiff from building a multi-family housing project outside the urban renewal area would impair significant interests sought to be advanced by the HAP and the ordinance. The fourth, sixth and seventh problems are "plan-specific" issues which could presumably have been solved with reasonable design modifications at the time appellants applied for rezoning of the parcel. The fifth concern also is largely plan-specific because proper landscaping could shield the project from the railroad and substation.

Thus, only the traffic issue and health hazard from the substation are site-specific. At trial, however, none of Huntington's officials supported these objections. Butterfield, for example, was primarily concerned that the

Matinecock Court project would "torpedo" the Town's plan to develop the site at Broadway and New York Avenue in the urban renewal area in Huntington Station. (Testimony of Kenneth C. Butterfield, JA-1752.) Moreover, Huntington's only expert, planner David Portman, set forth entirely different problems than were contained in Butterfield's letters. Specifically, he noted sewage concerns, lack of conformity with the low density of the surrounding neighborhood, and inaccessibility of the site to public transportation (Testimony of David J. Portman, JA-1508-11.) Once during his testimony, he did mention "the relationship [of the site] to the power station." (JA-1511) Never, however, did he raise any concern about a health hazard from the proximity to the substation. Indeed, appellees do not broach this issue in their brief to this court. Accordingly, we find the reasons asserted are entirely insubstantial.

The sewage problem was first raised at trial by appellees' expert Portman. Appellees now advance it as an additional concern. The district court, however, chose not to consider it. We agree. *Post hoc* rationalizations by administrative agencies should be afforded "little deference" by the courts, *Securities Indus. Ass'n. v. Board of Governors*, 468 U.S. 137, 143-4 (1984), and therefore cannot be a bona fide reason for the Town's action. Moreover, the sewage concern could hardly have been significant if municipal officials only thought of it after the litigation began. If it did not impress itself on the Town Board at the time of rejection, it was obviously not a legitimate problem. In sum, the only factor in the Town's favor was that it was acting within the scope of its zoning authority, and thus we conclude that the Town's justifications were weak and inadequate.

In balancing the showing of discriminatory effect against the import of the Town's justifications, we note our agreement with the Seventh Circuit that the balance should be more readily struck in favor of the plaintiff when it is seeking only to enjoin a municipal defendant from interfering with its own plans rather than attempting to compel the defendant itself to build housing. As the *Arlington Heights II* court explained, "courts are far more willing to prohibit even nonintentional action by the state which interferes with an individual's plan to use his own land to provide integrated housing." 558 F.2d at 1293. Bearing in mind that the plaintiffs in this case seek only the freedom to build their own project, we conclude that the strong showing of discriminatory effect resulting from the Town's adherence to its R-3M zoning category and its refusal to rezone the Matinecock Court site far outweigh the Town's weak justifications. Accordingly, to recapitulate, we find that the Town violated Title VIII by refusing to amend the zoning ordinance to permit private developers to build multi-family dwellings outside the urban renewal area. We also find that the Town violated Title VIII by refusing to rezone the Matinecock Court site. We thus reverse the district court and direct entry of judgment in appellants' favor.[12]

Appellees argue that we should deny site-specific relief because there are 64 "community development" sites available for low-cost multi-family housing in Hunting-

12 In its brief, the Town asks us to take judicial notice of a new proposal, approved by the Town Board in December, 1987, to build 50 units of subsidized housing in the Melville section. Although this proposed action is indeed laudable, we do not consider it. It is entirely speculative and smacks of a mid-litigation effort to demonstrate that the Town is acting in good faith. Moreover, the Town's action does not address the appellants' chief concern: that the zoning code perpetuates racial segregation in housing by restricting privately-built multi-family dwellings to the urban renewal area.

ton. They claim that a 1978 letter from Town Attorney Ronald Glickman to Michael Miness, Director of the Community Development Agency, established that any land within the community development areas can be rezoned as R-3M property. The record, however, makes clear that Glickman's interpretation of the zoning code was neither codified nor represents current Town policy. As late as 1983, Town Supervisor Butterfield stated that the ordinance restricted private developers to the urban renewal zone. (Deposition of Kenneth C. Butterfield, JA-2045-46.) The Town has maintained in its papers submitted to the district court and to the United States Supreme Court in its 1982 petition for certiorari in *Huntington I* that the R-3M district ". . . . provided for multiple dwellings in urban areas, or; if owned by the Housing Authority; within or without such an area . . ." Moreover, not only 63 of the "community development" parcels not presently zoned for multi-family housing, but most of the sites are not in fact vacant but are "underdeveloped." Therefore, there is only one site, not 64 sites, zoned and available for private low-cost multi-family housing. However, even as to the one site—the MIA site in Huntington Station—by the time of trial, HUD had determined it was in an area with a high concentration of minorities and therefore an inappropriate location for a federally subsidized housing development. (Testimony of HUD official, William Miecuna, JA-421-22.)

Ordinarily, HHI would not be automatically entitled to construct its project at its preferred site. The Town might well have legitimate reasons for preferring some alternative site to the one preferred by HHI. On the other hand, the Town would not be permitted to select a site that suits the Town's preference if that site imposed undue hardships on the applicant, such as distance from public trans-

portation or other services. Thus, we would ordinarily remand this case to the district court to afford the appellees an opportunity to identify an alternative site, outside the urban renewal area, that would be appropriate for HHI's project and eligible for the same financial arrangements and assistance available at the Matinecock Court site. If the Town identified such a site, it would then have the burden of persuading the district court that there were substantial reasons for using its preferred site and that those reasons did not impose undue hardships on the appellants. If the district court was not persuaded on balance of the benefits of an alternative site, it would then enter an appropriate judgment to enable HHI to proceed with its project at the Matinecock Court site.

This case, however, is not ordinary. First, we recognize the protracted nature of this litigation, which has spanned over seven years. Further delay might well prove fatal to this private developer's plans. Second, other than its decision in December 1987 to build 50 units of low-income housing in the Melville section, the Town has demonstrated little good faith in assisting the development of low-income housing. After the Town began receiving federal community development funds, HUD found it necessary to pressure the Town continually to include commitments for construction of subsidized family housing in the Town's HAPs. Because of the Town's lack of progress in constructing such housing, HUD imposed special conditions on the Town's community development grants for the 1978 fiscal allocation. Thereafter, HUD continued to express its dissatisfaction with the Town's performance. This history, while it does not rise to a showing of discriminatory intent, clearly demonstrates a pattern of stalling efforts to build low-income housing.

Third, the other 63 parcels outside the urban renewal area are not presently zoned for multi-family housing and, indeed, the zoning ordinance presently forbids rezoning of these properties. Thus, this situation differs from *Arlington Heights II*, where 60 tracts currently zoned for multi-family housing were available and, accordingly, the Seventh Circuit remanded the case to the district court to determine if one of those sites were suitable. *Arlington Heights II*, 558 F.2d at 1295. Appellees cannot argue, as they do now, that the zoning ordinance does not now limit private builders to the urban renewal area when the Town Board in its January 6, 1981, resolution refused to amend the ordinance to delete the restriction of such housing to the urban renewal area, and appellees throughout this litigation have defended that decision. We therefore refuse to remand this case to the district court to determine the suitability of the 63 sites outside the urban renewal area. Rather, we find that site-specific relief is appropriate in this case.

Accordingly, we direct the district court to include in its judgment provision ordering the Town to rezone the 14.8 acre Matinecock Court site located at the corner of Elwood and Pulaski Roads in Huntington Township to R-3M status. The judgment should also order the Town to strike from its R-3M zoning ordinance that portion which limits private multi-family housing projects to the urban renewal area.

Judgment of the United States Court of Appeals Filed April 5, 1988

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 87-7892

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of April, one thousand nine hundred and eighty eight.

Present:

HON. IRVING R. KAUFMAN,
HON. JAMES L. OAKES,
HON. JON O. NEWMAN,

Circuit Judges.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD, and KENNETH L. COFIELD,

Plaintiffs-Appellants,

—v.—

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is reversed and the appellants are granted site-specific relief in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH, CLERK

BY: /s/ EDWARD J. GUARDARO
Edward J. Guardaro, Deputy Clerk

Contrary to the Town's contention, the standards for weighing a defendant's justifications under a disparate impact analysis are also well established by the Courts of Appeals and are in line with this Court's decision in *Griggs*, in which the defendant was required to show a "business necessity" justifying its actions. Since this Court remanded *Metropolitan Housing Development Corp. v. Village of Arlington Heights, (Arlington Heights I)*, 429 U.S. 252 (1977), the Courts of Appeals have been developing a standard in line with *Griggs* to weigh defendants' justifications in Title VIII cases.[5] The various standards developed by the Courts of Appeals do not conflict with one another. After some showing of disparate impact is made, all of the Courts of Appeals subjected defendants' asserted justifications to a heightened degree of judicial scrutiny.

The Court of Appeals in this case followed the Third Circuit's reformulation of *Griggs* that the defendant "must prove that its actions furthered, in theory and in practice, a legitimate *bona fide* governmental interest and that no alternative would serve that interest with less discriminatory effect" (22a, citing *Rizzo, supra*, 564 F.2d at 148-149). The Second Circuit also considered the two additional factors considered by the Seventh Circuit in *Arlington Heights II*: whether there is any evidence of

---

[5] In *United States v. City of Black Jack*, 508 F.2d at 1185, which was decided before the remand of *Arlington Heights I*, the Eighth Circuit required the defendant to justify its conduct by a showing of a compelling governmental interest. This standard has not been followed by any other Court of Appeals, including the Second Circuit.

discriminatory intent and whether the plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing (22a).

Because the Second Circuit formulated a test consistent with *Griggs* and with the tests articulated by the other Circuits, the standard applied by the Court of Appeals should not be disturbed on appeal. The slight variations in the standards articulated by the various Courts of Appeals simply do not rise to the level of a conflict. Moreover, all of these standards are derived from *Griggs*, and are consistent with the purpose of Title VIII.

III.

HUNTINGTON'S RELIANCE ON ITS ZONING AUTHORITY DOES NOT SHIELD IT FROM TITLE VIII LIABILITY

Huntington also contends that this matter raises a substantial question because it arises within the framework of the Town's exercise of its zoning authority. The fact that Town officials acted pursuant to local zoning prerogatives does not, however, immunize their conduct from Title VIII liability. The Court of Appeals correctly stated, "[t]hough a town's interests in zoning requirements are substantial, see *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), they cannot consistently with Title VIII, automatically outweigh significant disparate effects" (23a). In this case, the Court of Appeals concluded that the ordinance "impedes integration by restricting low-income housing needed by minorities to an area already

52% minority" (25a). It is well established that in such a situation "the discretion of local zoning officials must be curtailed where the clear result of such discretion is the segregation of low income Blacks from all White neighborhoods." *Black Jack, supra,* 508 F.2d at 1184 (citations omitted).

IV.

THE RELIEF ORDERED BY THE COURT OF APPEALS RAISES NO SUBSTANTIAL QUESTION WARRANTING REVIEW BY THIS COURT

The relief ordered by the Second Circuit in this case forms no basis for an appeal to this Court. Contrary to the Town's argument, the Second Circuit did not restructure the operation of any governmental entity in this case (Jur. State. at 28). Rather, the Court specifically noted that "[o]rdinarily, HHI would not be automatically entitled to construct its project at its preferred site" (33a) and concluded:

> This case, however, is not ordinary. First, we recognize the protracted nature of this litigation, which has spanned over seven years. Further delay might well prove fatal to this private developer's plans. Second, other than its decision in December 1987 to build 50 units of low-income housing in the Melville section, the Town has demonstrated little good faith in assisting the development of low-income housing. . . . This history . . . clearly demonstrates a pattern of stalling efforts to build low-income housing (34a).

The Second Circuit also noted that site specific relief was appropriate because there were no other suitable parcels presently zoned for multi-family construction (33a).[6]

The relief ordered by the Court of Appeals is also appropriate because the Town had ample opportunity to study HHI's proposal as part of the Section 213 review process. Moreover, every conceivable aspect of the proposed project has been dissected in the course of this litigation. If there were any real problem with the proposal, it would have surfaced and been made part of the record. Under these circumstances, the Court of Appeals' decision to award site specific relief does not raise an issue suitable for review by this Court.

V.

THERE IS NO BASIS FOR DISMISSING APPELLEES', CLAIM ON STANDING OR MOOTNESS GROUNDS

Finally, the Town argues in its Questions Presented (but does not further discuss in the body of its Jurisdictional Statement) that appellees' claims should have been dismissed on grounds of lack of standing or mootness. This argument, apparently based on the Town's claim that HHI is financially unable to build the project in the absence of federal subsidies, was rejected by the Court of

---

[6] There is only one vacant multi-family zoned site in Huntington – the so-called MIA site in the urban renewal area. As the Second Circuit stated, "by the time of trial, HUD had determined it was in an area with a high concentration of minorities and therefore an inappropriate location for a federally subsidized housing development (Testimony of HUD official, William Miecuna, JA-421-22)" (33a).

Appeals in 1982. *Huntington Branch NAACP, et al. v. Town of Huntington, et al. (Huntington I)*, 689 F.2d 391 (2d Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983). The district court in *Huntington II* did not find that HHI lacked the financial resources to proceed with the project and the Court of Appeals did not address the issue. Accordingly, the Second Circuit's prior ruling is dispositive.

In any event, plaintiffs presented expert testimony at trial setting forth detailed calculations and projections establishing that the project can be constructed with private monies in the absence of federal subsidies (T791-802, 954-960, 1977-1978; Pl. Ex. 99F). Therefore, appellants raise no valid claims of nonjusticiability to be decided by this Court.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal as not within the scope of 28 U.S.C. § 1254(2) or, in the alternative, affirm the judgment of the Court of Appeals.

Dated: New York, New York
June 24, 1988

Respectfully submitted,

STEEL BELLMAN & LEVINE, P.C.
Attorneys for Plaintiffs-Appellants
351 Broadway
New York, New York 10013
(212) 925-7400

GROVER G. HANKINS
Attorney for Plaintiffs-Appellants
General Counsel
National Association for the Advancement of Colored People
4805 Mount Oak Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

On the Brief
RICHARD F. BELLMAN
LEWIS M. STEEL
MIRIAM F. CLARK

REPLY

BRIEF

Supreme Court, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

—v.—

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

APPELLANTS' BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM

RICHARD C. CAHN,
Special Counsel to the
Town of Huntington

CAHN WISHOD WISHOD & LAMB
Attorneys for Appellants
534 Broadhollow Road
CB-179
Melville, New York 11747
(516) 694-2300

Richard C. Cahn
Scott M. Karson
On the brief

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT	1
POINT I THIS COURT'S APPELLATE JURISDICTION HAS BEEN PROPERLY INVOKED	1
POINT II THE CASE PRESENTS SUBSTANTIAL AND IMPORTANT FEDERAL QUESTIONS	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases: PAGE

Huntington Branch, NAACP v. Town of Huntington ("Huntington I"), 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) 6

Lindsey v. Normet, 405 U.S. 56 (1972) 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 4

Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights ("Arlington Heights II"), 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) 3, 5

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 4, 5

Statutes:

Huntington Town Code § 198-20 1

28 U.S.C. § 1254(2)..... 1, 2

Other Authorities:

Comment, *Developments-Zoning*, 91 Harv. L. Rev. 1427, 1683-1684 (1978) 4

STATEMENT

This brief is submitted in opposition to the appellees' motion to dismiss or affirm.

I.

THIS COURT'S APPELLATE JURISDICTION HAS BEEN PROPERLY INVOKED

Contrary to the appellees' assertion, this matter lies squarely within the appellate jurisdiction of this Court, because the appellants rely upon "a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States," *see*, 28 U.S.C. § 1254(2). Although the appellees claim in their motion that the judgment of the Court of Appeals does not strike the ordinance in question (Mot. to Dism. or Aff., at 13, 15), the record plainly demonstrates that, in fact, the Second Circuit expressly directed the District Court to include in its judgment a provision "order[ing] the Town to strike from its R-3M zoning ordinance that portion which limits private multi-family housing projects to the urban renewal area" (J.S. App. 35a).

1. The R-3M provision of the Huntington Town Code (§ 198-20) provides, on its face, that privately-developed multiple-family dwellings could only be located within the Town's urban renewal area (J.S. App. 94a). However, the record demonstrates that because the urban renewal program had been superseded by the community development program, the Town had, in practice, broadened its interpretation and application of § 198-20 to permit privately-developed multiple-family dwellings within the community development areas, thereby causing a dramatic increase in the amount of land within the Town available for R-3M use by private developers. Nevertheless, the Second Circuit rejected the Town's claims and refused to remand the case for consideration of 63 alternative sites for appellees' proposed housing project, all of which are located within the community development areas. The Second Circuit held that these alternative sites were unavailable because

"the zoning ordinance *presently* forbids rezoning of these properties" (J.S. App. 35a [emphasis added]), and the Town Attorney's 1978 opinion letter and the 1979 Lincoln School and 1987 Melville rezonings which relied upon it did not represent "*current* Town Policy" (J.S. App. 33a [emphasis added]). Indeed, the appellees so argued below, and continue to do so here, stating: "This provision, as applied, has the effect of limiting such [privately-developed multiple-family] housing to a disproportionately minority area" (Mot. to Dism. or Aff., at 13). The appellees also refer to the trial testimony of HUD official William Miecuna, purporting to support the contrary position that R-3M zoning was available on a Town-wide basis even before the Second Circuit's ruling (Mot. to Dism. or Aff., at 14), so that the ruling did not invalidate the ordinance as it had been construed by the Town. However, the cited testimony (T434-436) has been misrepresented to this Court by appellees; Miecuna drew a distinction between area-specific and activity-specific community development funds, and it is only the latter funds which may be spent town-wide. Therefore, prior to the Second Circuit's decision, R-3M zoning was only available to private developers without a code change in the areas previously designated by the Town as exclusively eligible for the expenditure of area-specific community development funds.

Thus, it is very clear that, in directing that the ordinance's facial limitation to the urban renewal area be stricken, the Second Circuit effectively removed all limitations. Although there is substantial evidence in the record that the Town enacted § 198-20 to control, in keeping with proper and lawful zoning considerations, the geographical location of multiple-family dwellings, the ordinance's designation of specific areas which the Town deemed appropriate for private development of such dwellings has now been invalidated by the Second Circuit.

2. The United States, by the Solicitor General, has submitted a brief as *amicus curiae*, concluding that because the Second Circuit invalidated a portion of the Town's ordinance, this Court's appellate jurisdiction has been properly invoked pursuant to 28 U.S.C. § 1254(2). The rarity of such a filing at the jurisdictional statement stage underscores the strong belief on the part of the United States that this Court should note probable jurisdiction.

II.

THE CASE PRESENTS SUBSTANTIAL AND IMPORTANT FEDERAL QUESTIONS

The questions presented in the Jurisdictional Statement are all substantial. No question relating to the interpretation of Title VIII has ever been ruled upon by this Court. The Solicitor General strongly urges the Court to hold that evidence of discriminatory intent is an absolute prerequisite to the establishment of liability under Title VIII. He also urges this Court to exercise its discretion to reach and review the Court of Appeals' rezoning decision, which was that an "effects" test rather than an "intent" test is applicable for determining liability under Title VIII. The Solicitor General reaches his conclusion "based on the importance of the issue and the incorrectness of the decision below."

The Town of Huntington has consistently argued that *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) ("*Arlington Heights II*"), which refused to apply a *per se* effects test such as has been applied by the Second Circuit here, requires some showing of discriminatory motivation, particularly in the context of a zoning action which, by its nature, will inevitably have a significant discriminatory effect upon some group.[1]

---

1 Counsel for the appellees understood the Town's argument upon its motion to dismiss the Title VIII claims at the close of the plaintiffs' case, to be as follows: "What the defendants are arguing here and their entire analysis, [is] that we carry a burden of showing motivation, discriminatory motivation on the part of the defendants. We reject that claim and say the impact standard applies under title 8" (T1184-1185). The brief field by the United States argues forcefully that the language of Title VIII, its history, and the practical difficulties in applying an "effects" test to zoning policies and decisions—strongly indicate that in the absence of discriminatory motivation, no Title VIII violation can be established. Appellants also make this argument (J.S. 4).

The Town has also argued in both lower courts that a discriminatory treatment test—an intent-based standard—should be applied to the denial of a zoning application. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

In the District Court, the Town argued that it enacted the R-3M provision for sound, non-discriminatory reasons, to encourage capital investment in the urban renewal area. Judge Glasser held that there was no "persuasive proof that enactment or implementation of the zoning code has perpetuated segregation or been motivated by discriminatory impulses" (J.S. App. 82a).

Considering the fact that civil rights advocates argue that zoning laws are a principal device used by communities to prevent integration, *see*, Comment: *Developments-Zoning*, 91 Harv. L.Rev. 1427, 1683-1684 (1978), the question as to how Title VIII should impact upon zoning decisions, which are ordinarily accorded the utmost deference, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is hardly insubstantial.

Appellees claim that the "various standards developed by the Courts of Appeals do not conflict with one another" (Mot. to Dism. or Aff., at 18) and that the differences among the Circuits constitute "slight variations," (*id.*, at 19); the Solicitor General, in contrast, notes "some troublesome discrepancies among the courts regarding the appropriate standard for evaluating the defendant's justifications" but believes that those differences do not constitute a "clear" conflict. We disagree. There are material conflicts regarding the threshold question as to what statistical test, if any, should be employed to determine whether a discriminatory effect exists (J.S. 21-22) and which region or area is relevant in making that determination.[2] There is sharp disagreement on the standard for justifying a discriminatory effect (J.S. 26-28). The appellees are simply wrong in arguing that "all of the Courts of Appeals subjected defendants'

2 Contrary to appellees' statement (Mot. to Dism. or Aff., at 17), the Second Circuit limited its finding of discriminatory effect to the Town's territory and expressly declined to make a finding that the Town's actions had a discriminatory effect upon the region. J.S. App. 25a, n. 8.

asserted justifications to a heightened degree of judicial scrutiny" (Mot. to Dism. or Aff., at 18). To the contrary, the seminal case, *Arlington Heights II*, applies a four-pronged analysis to balance the interests of the plaintiffs and the municipal defendants in order to determine whether a Title VIII violation has been established. In light of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Lindsey v. Normet*, 405 U.S. 56 (1972), this Court ought to decide what the proper balance should be under Title VIII between a municipality's legitimate zoning prerogatives[3] and an individual's claim to housing in a specific location.[4] We believe that a summary affirmance would necessarily constitute a determination that the Second Circuit applied the correct standard under Title VIII, thereby elevating

3 The *amicus* application filed by the New York Planning Federation, which represents 9,000 members of planning boards and zoning boards of appeal in over 500 municipalities throughout the State of New York, states that the Second Circuit decision "jettisons long-established principles of municipal zoning which have for many years resulted in orderly development, the appropriate preservation of property and family values and the accommodation of the diverse housing needs of each community and region." Proposed Brief *Amicus Curiae* of the New York Planning Federation, at 2-3.

4 On the rezoning issue, contrary to appellees' assertion (Mot. to Dism. or Aff., at 7) there is a vigorous dispute between the parties as to whether Housing Help, Inc. requested the Town Board to amend § 198-20 of the Code. The first discussion with Board members was initiated by Housing Help, Inc. at an informal meeting at which the Board members were unauthorized to discuss or transact business under New York's Open Meetings Law (J.S. 12, App. 10a), and at which appellees were told to follow the formal zoning procedures prescribed by the Code (J.S. 12). The document later filed by Housing Help, Inc. with the Town Clerk, which apparently did not surface until this litigation, did not comply with Huntington's formal zoning procedures, and was described when presented merely as a paper containing "a number of suggestions for the Community Block Grant application" (J.S. 12), a description not calculated to put the Town Board members on notice that zoning code changes were being applied for. Appellants maintain that the Second Circuit did engage in unauthorized fact-finding in overruling the District Court's finding that no zoning application was ever made. Such a finding by the appeals court cannot be justified as a "mixed finding of law, or a finding of fact that is predicated on a misunderstanding of the governing rule of law" (Mot. to Dism. or Aff., at 2). To the contrary, it was the Second Circuit which completely misunderstood the requirements of state and local law relating to rezoning requests.

the Second Circuit's version of the "effects" test to nationwide application. It would substantially erode the power of local municipalities to make zoning decisions applying traditional locational criteria for multiple dwellings, particularly in light of the circuit court's grant of site-specific relief, concededly without a zoning map application having been made, which would have been subjected to the environmental review process and to other studies, and which would have resulted in a decision which could have been judicially reviewed on the merits. And, it would do so in a case where appellees at trial simply relied upon the earlier Second Circuit holding in this case, *Huntington Branch, NAACP v. Town of Huntington ("Huntington I")*, 689 F.2d 391 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983), related to standing, and made no attempt to show any realistic financial ability on their part to construct their proposed project.

This Court should not summarily affirm or dismiss, but should fix a nationwide standard for Title VIII after plenary consideration of the case on the merits.

CONCLUSION

For all of these reasons, probable jurisdiction should be noted.

Dated: Melville, New York
June 30, 1988

Respectfully submitted,

RICHARD C. CAHN
Special Counsel,
Town of Huntington

CAHN WISHOD WISHOD & LAMB
Attorneys for Appellants
534 Broadhollow Road
CB-179
Melville, New York 11747
(516) 694-2300

On the Brief:

Richard C. Cahn
Scott M. Karson

AMICUS CURIAE

BRIEF

(3)

No. 87-1961

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, ET AL., APPELLANTS

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

MARK R. DISLER
ROGER CLEGG
Deputy Assistant Attorneys General

MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

DAVID K. FLYNN
WILLIAM R. YEOMANS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

86 pp

QUESTION PRESENTED

Whether the Town of Huntington's zoning ordinance, which on its face prevented private construction of multi-family low-income housing outside an urban renewal area, and the Town's refusal to rezone a specific site to permit such construction violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, on the basis of findings that the Town's actions had a discriminatory effect on minority residents and lacked sufficiently legitimate justifications.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Discussion	9
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Arthur v. *City of Toledo*, 782 F.2d 565 (6th Cir. 1986) ... 12
City of Mobile v. *Bolden*, 446 U.S. 55 (1980) ... 15
Davis v. *Scherer*, 468 U.S. 183 (1984) ... 11, 19
Ferraris v. *Ridge Tool Co.*, 400 U.S. 41 (1970) ... 11
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) ... 15
Gonzales v. *Automatic Employees Credit Union*, 419 U.S. 90 (1974) ... 11
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) ... 15
Guardians Ass'n v. *Civil Service Comm'n*, 463 U.S. 582 (1983) ... 15
Hanson v. *Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986) ... 12, 13
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) ... 6
Metropolitan Hous. Dev. Corp. v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) ... 6, 13, 15-16, 17
Nashville Gas Co. v. *Satty*, 434 U.S. 136 (1977) ... 15
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) ... 14-15, 16
Resident Advisory Bd. v. *Rizzo*, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978) ... 12-13, 15, 17
Smith v. *Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982) ... 12
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972) ... 18
United States v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975) ... 13
United States v. *Fruehauf*, 365 U.S. 146 (1961) ... 12

Cases – Continued: Page

Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 13
Village of Belle Terre v. *Boraas*, 416 U.S. 1 (1974) 18

Constitution, statutes and regulation:

U.S. Const. Amend. XIV (Equal Protection Clause) 5, 13
Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
Tit. VI, 42 U.S.C. 2000d *et seq.* 15
Tit. VII:
42 U.S.C. 2000e-2(a)(1) 15
42 U.S.C. 2000e-2(a)(2) 15
Civil Rights Act of 1968, Tit. VIII, 42 U.S.C. 3601 *et seq.* ..... *passim*
42 U.S.C. 3601 17
42 U.S.C. 3604(a) (§ 804(a)) 14
42 U.S.C. 3604(b) 14
42 U.S.C. 3604(c) 14
42 U.S.C. 3604(d) 14
42 U.S.C. 3604(e) 14
42 U.S.C. 3605 14
42 U.S.C. 3606 14
42 U.S.C. 3610 1
42 U.S.C. 3613 1
Housing Act of 1949, Tit. I, 42 U.S.C. (& Supp. III) 1450 *et seq.* 2
Housing and Community Development Act of 1974, 42 U.S.C. (& Supp. III) 5301 *et seq.* 2, 3
Voting Rights Act of 1965, 42 U.S.C. (& Supp. III) 1971 *et seq.*:
§ 2, 42 U.S.C. 1973 15
§ 5, 42 U.S.C. 1973c 15
28 U.S.C. 1254(2) 9, 10
42 U.S.C. (& Supp. III) 1437f 4
42 U.S.C. (& Supp. III) 1439(a)(1) 4
42 U.S.C. 1982 5
42 U.S.C. 1983 5
Huntington, N.Y., Town Code § 198-20 ..... 2, 3, 11, 19

Miscellaneous: Page

114 Cong. Rec. (1968):
p. 2277 17
p. 3422 18
p. 4974 17
p. 4976 17
p. 5643 17
Fair Housing Act of 1967: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967) ... 16
H.R. Rep. 100-711, 100th Cong., 2d Sess. (1988) 18
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* (1988) 11

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1961

TOWN OF HUNTINGTON, NEW YORK, ET AL., APPELLANTS

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This cases involves an application of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, as a restriction on local governmental zoning practices. The United States Department of Housing and Urban Development (HUD) has responsibility under the Fair Housing Act to receive, investigate, and attempt to resolve complaints of discrimination through "conference, conciliation, and persuasion" (42 U.S.C. 3610). The United States Department of Justice is further responsible under the statute for redressing by judicial action patterns and practices of discriminatory conduct. See 42 U.S.C. 3613.

STATEMENT

1. Appellant, the Town of Huntington, New York, according to 1980 census figures, had approximately 200,000

people, 95% of whom were white and 3.35% of whom were black. Roughly 70% of the Town's black residents lived within six census tracts located in the Huntington Station and South Greenlawn sections, which were also part of the Town's urban renewal area. J.S. App. 5a.[1] "Outside these two neighborhoods, the Town's population was overwhelmingly white" (*ibid.*). The Town had a shortage of rental housing for low and moderate-income households. This shortage disproportionately affected black residents: 7% of all of the Town's families needed subsidized housing, but 24% of the Town's black families required such assistance. *Ibid.*

As part of its efforts under the urban renewal program, the Town created a zoning classification known as the "R-3M Garden Apartment District" (J.S. App. 42a), and permitted multi-family housing to be built in areas so designated. The relevant zoning ordinance, Section 198-20 of the Code of the Town of Huntington,[2] restricted private construction of such multi-family housing to the urban renewal area; the ordinance allowed the Huntington

[1] During the 1960s, the Town participated in the federal urban renewal program. See Housing Act of 1949, Tit. I, 42 U.S.C. (& Supp. III) 1450 *et seq.* The state legislature created the Huntington Urban Renewal Agency, which in turn supervised the Town's urban renewal plan. One aspect of the plan was the designation of that area of the Town which needed housing development. J.S. App. 40a-41a. The "urban renewal area" became the sections of the Town in and surrounding Huntington Station, which contained "[t]he greatest concentration of [the Town's] substandard dwelling units" (*id.* at 40a). Congress terminated urban renewal programs in 1974 and enacted the Community Development Block Grant Program as part of the Housing and Community Development Act of 1974, 42 U.S.C. (& Supp. III) 5301 *et seq.*

[2] Section 198-20, by reference to other zoning regulations, included restrictions related to such things as off-street parking and loading, height, area, and bulk, and site plan development.

Housing Authority (HHA) to build such housing "townwide" (J.S. App. 7a). HHA's only multi-family housing project was in the urban renewal area (*ibid.*). Following enactment of the Housing and Community Development Act of 1974, 42 U.S.C. (& Supp. III) 5301 *et seq.*, the Town designated certain areas as community development areas (J.S. App. 40a), created the Huntington Community Development Agency (CDA), and considered applications for block grants for construction within the community development areas (*id.* at 43a). Evidence in the record suggests that, following these developments, the Town neither read nor applied Section 198-20 as prohibiting private construction of multi-family housing outside the urban renewal area, but, instead, treated the ordinance as permitting such development within the much larger "community development areas" (J.S. App. 40a; see *id.* at 7a n.4, 32a n.12, 57a; R. E-14, E-175, E-264 to E-265).[3]

Beginning in 1978, Housing Help, Inc. (HHI), a non-profit housing civil rights organization headquartered in Huntington, launched its efforts to build a subsidized, low-income housing project for the Town. Although HHI found an available site within the urban renewal area, HHI decided not to build on that site. The organization wished to sponsor an integrative housing project and the "[urban renewal] area already had a substantial minority population" (J.S. App. 77a-78a; see *id.* at 8a). On January 23, 1980, HHI obtained an option to purchase a vacant

[3] The Town continues to maintain, as it has throughout this litigation, that Housing Help, Inc. (HHI), never properly applied for rezoning of its Matinecock Court project, and simply bypassed the Town's zoning procedures. See J.S. 4, 12-13, 15, 28; J.S. App. 79a-80a; Mar. 3, 1988 Tr. of Oral Arg. 30-31, 36-37; R. A-39. The court of appeals, however, overturned the district court's finding that HHI had not effectively applied for rezoning (J.S. App. 13a-14a).

14.8-acre site located in an area that was 98% white. The site was zoned "R-40" for single family homes on lots of at least one acre. *Id.* at 9a, 78a. HHI intended to obtain a rezoning from the Town for its planned 162-unit Matinecock Court project. On February 26, 1980, a director of HHI addressed the Town Board at a public meeting and "filed a document * * * request[ing] 'a commitment by the Town to amend the zoning ordinance to allow multi-family rental construction by a private developer' " (*id.* at 78a; see *id.* at 10a).

On August 28, 1980, HHI filed with the United States Department of Housing and Urban Development (HUD) its application for "Section 8" funding for the Matinecock Court project.[4] On October 9, 1980, the director of the CDA reviewed HHI's application for federal funding. The CDA disapproved of the project on a number of grounds, including the project's conflict with the Town's Housing Assistance Plan's goals of no new construction, the site's existing R-40 zoning restriction, the project's poor parking plans, the project's "inadequate" recreation facilities and unit size, and the site's traffic difficulties. On October 14, 1980, a letter was sent expressing the views of the "Town's professional staff in the Planning, Legal and Community Development Departments," recommending that HUD disapprove the proposal. J.S. App. 10a-11a, 44a-45a & n.1.[5]

---

[4] "Section 8" refers to a federal program that provided subsidies for newly built and substantially rehabilitated housing. See 42 U.S.C. (& Supp. III) 1437f.

[5] Under 42 U.S.C. (& Supp. III) 1439(a)(1), HUD must refer a Section 8 application for funding to the town having a Housing Assistance Plan previously approved by HUD; the statute gives the town an opportunity to comment on the application's compatibility with the existing Plan. See J.S. App. 10a, 46a.

HHI's proposed project also met substantial opposition when it became public. Town residents formed the Concerned Citizens Association and submitted to the Town Board a petition containing 4,100 signatures against the project. Ultimately, on January 6, 1981, the Town Board rejected HHI's

> propos[al] * * * that Huntington's zoning code be changed in order to build [the Matinecock Court project] * * * find[ing] that * * * the location [of the project] is not an appropriate location due to lack of transportation, traffic hazard and disruption of the existing residential patterns in the * * * area.

J.S. App. 12a-13a.

2. On February 23, 1981, HHI, the Huntington Branch of the NAACP, and several black, low-income residents of Huntington filed a complaint against the Town and members of the Town Board in the United States District Court for the Eastern District of New York. The complaint alleged, among other claims,[6] that the Town had violated Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, by restricting private construction of multi-family housing to the urban renewal area and by refusing to rezone the site of HHI's proposed project. J.S. App. 38a-39a.[7] Following

---

[6] Plaintiffs also alleged claims under the Equal Protection Clause, 42 U.S.C. 1982 and 1983, and New York state law (J.S. App. 38a-39a). These claims are no longer at issue. See *id.* at 3a n.1.

[7] The complaint also named as defendants HUD and its Secretary. The district court initially dismissed the complaint, holding that plaintiffs lacked standing (530 F. Supp. 838 (1981)). The court of appeals reversed and remanded (689 F.2d 391 (1982), cert. denied, 460 U.S. 1069 (1983)). Plaintiffs did not appeal the dismissal with respect to the federal defendants, and thus the case proceeded against only the Town.

On November 7, 1983, the district court certified the case as a class action and defined the class as roughly "[a]ll black, Hispanic and lower

a bench trial, the district court, on three alternative grounds, held that plaintiffs failed to prove that the Town had violated the Fair Housing Act (*id.* at 78a-86a).[8]

First, the court reviewed plaintiffs' claims under the four-part order of proof set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). The court found that plaintiffs never formally applied for rezoning of the site and thus concluded that their claim failed for that reason alone because "the second *McDonnell Douglas* element [was] missing" (J.S. App. 81a), namely, that plaintiffs applied for and qualified to build the housing sought (*id.* at 79a-81a).

Second, the court considered plaintiffs' claims under the four-part test of *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (*Arlington Heights II*), cert. denied, 434 U.S. 1025 (1978). The court found that the Town's actions had only a slight "discriminatory effect" (J.S. App. 82a), the evidence "did not give rise to an aura of discriminatory intent" (*id.* at 83a), and the Town's actions "with respect to the zoning process and housing in general were supported by [the] rational and legitimate concerns" the Town had submitted to HUD in its October 14, 1980, letter (*ibid.*). The court thus concluded that, even assuming plaintiffs had applied for rezoning, the evidence was insufficent to establish a prima facie case of discrimination under the Fair Housing Act (*id.* at 83a-84a).

---

income persons in need of lower cost housing opportunities in Huntington and surrounding areas" (J.S. App. 39a).

[8] As a threshold matter, the court concluded that "[i]t [was] not necessary for plaintiffs to prove discriminatory intent before they may succeed on a claim under section 3604(a) [pertaining to discriminatory sale or rental decisions]" (J.S. App. 75a).

Third, the court concluded that, assuming plaintiffs had established a prima facie case under the balancing test of *Arlington Heights II*, the Town adequately rebutted the allegations by "legitimate, nondiscriminatory reasons for its conduct, and those reasons [had] not been exposed as pretextual" (J.S. App. 84a).

3. The court of appeals reversed (J.S. App. 1a-35a), holding that the Town had violated the Fair Housing Act by refusing to permit private construction of multi-family housing outside the urban renewal area and by refusing to rezone plaintiffs' site (*id.* at 32a). The court ordered "site-specific" relief, directing the Town to rezone plaintiffs' site, and also ordered the Town "to strike from [the] zoning ordinance that portion which limits private multi-family housing projects to the urban renewal area" (*id.* at 35a).

After reviewing relevant case law, legislative history, and the parallel to Title VII, the court concluded that the plaintiff need only show "discriminatory impact" (J.S. App. 18a), and that "a Title VIII violation can be established without proof of discriminatory intent" (*id.* at 17a-20a). Turning to the proper standard to evaluate the defendant's conduct and justifications once the plaintiff established a prima facie case, the court concluded that the "defendant must present bona fide and legitimate justifications for its actions with no less discriminatory alternatives available" (*id.* at 27a).[9]

---

[9] The court rejected the district court's apparent requirement that the plaintiff prove that the defendant's justifications were pretextual because "an intent-based standard for disparate treatment cases [was] inapposite to the disparate impact claim asserted" (J.S. App. 28a). The court similarly criticized the district court's application of the *McDonnell Douglas* test and overturned the finding that plaintiffs had

The court noted that the Town's zoning ordinance "impedes integration by restricting low-income housing needed by minorities to [the urban renewal] area already 52% minority" and found that the Town's refusal to amend that "restrictive zoning ordinance to permit privately-built multi-family housing outside the urban renewal area significantly perpetuated segregation in the Town" (J.S. App. 25a (footnote omitted)).[10] Similarly, given the greater percentage of minority residents needing

---

not applied for rezoning. According to the court of appeals (*id.* at 14a), the record showed that the

> parties thus clearly understood that an application for a zoning change had been made * * * [and] the Town's refusal to amend the zoning code rendered meaningless a request to change the zoning on the [proposed project site], as R-3M classifications were reserved for property within the urban renewal area, and there were no other multi-family housing designations.

In light of the court of appeals' conclusion that plaintiffs need not present proof of discriminatory intent, the court did not review the district court's findings regarding the Town's intent to discriminate (J.S. App. 24a n.7).

[10] The court of appeals was unmoved by the argument of the Town that

> R-3M zoning is available to any private developer * * * in any of the areas designated as community development areas * * * [and] that there would be absolutely no objection on the Town's part * * * to amend the ordinance so as to be consistent with [the Town's asserted policy of] allowing private developers, wherever they are, in these community development areas.

Mar. 3, 1988 Tr. of Oral Arg. 27, 30. See p. 3, *supra*.

The court concluded that "[a]ppellees cannot argue, as they do now, that the zoning ordinance does not now limit private builders to the urban renewal area when the Town Board in its January 6, 1981, resolution refused to amend the ordinance to delete the restriction of such housing to the urban renewal area, and appellees throughout this litigation have defended that decision" (J.S. App. 35a).

subsidized housing, the Town's refusal to rezone plaintiffs' site "had a substantial adverse impact on minorities" (*id.* at 27a (footnote omitted)). The court thus concluded (*ibid.*) that

> the disproportionate harm to blacks and the segregative impact on the entire community resulting from the refusal to rezone create a strong prima facie showing of discriminatory effect * * *.

Reviewing the Town's asserted justifications for its actions, the court concluded that the reasons outlined in the Town's October 14, 1980, letter to HUD were "entirely insubstantial," "weak and inadequate," and not supported by the record (J.S. App. 31a). In holding that the Town's actions violated the Fair Housing Act, the court stated that "the strong showing of discriminatory effect resulting from the Town's adherence to its * * * zoning [ordinance] and its refusal to rezone the Matinecock Court site far outweigh the Town's weak justifications" (*id.* at 32a).

DISCUSSION

1. This case comes before the Court as an appeal pursuant to 28 U.S.C. 1254(2). Because the court of appeals struck down a portion of the Town's ordinance, and because the Town's jurisdictional statement is fairly understood to challenge that action,[11] we believe that this Court's appellate jurisdiction has been properly invoked. The case is appropriately treated as an appeal because the

---

[11] J.S. 29. The Town appears to be concerned primarily with the court of appeals' order of site-specific relief, rather than with the court's striking down of the ordinance. Each of the five questions presented in the jurisdictional statement appears to have as its central focus the court of appeals' action in overriding the Town's refusal to rezone appellees' site for multi-family housing.

Town is "relying on a State statute held by a court of appeals to be invalid as repugnant to the * * * laws of the United States" (28 U.S.C. 1254(2)).

In contesting the court of appeals' invalidation of the ordinance (as distinct from its order directing rezoning), however, the Town raises no issue meriting this Court's plenary consideration. The Town conceded below that a discriminatory impact or effects test governs the Title VIII challenge to the ordinance. See Defendants' Trial Mem. 48; Appellees' C.A. Br. 27-29, 37; J.S. App. 16a-17a, 62a-63a. And we do not read the Town even now as arguing to the contrary. It rather appears to pursue the argument, initiated below, that the properly applicable effects test has been misapplied. See J.S. 21-28.

We believe that there is a substantial question, meriting this Court's attention, as to whether an intent test or an effects test governs under Title VIII. Indeed, we believe that the court below, and the other courts of appeals which have addressed the issue, have erred in holding that a showing of discriminatory effect will suffice. Since the court below decided that discriminatory intent is not an essential element of a Title VIII violation, that issue can be reviewed by this Court. At the same time, if the Court were disposed, contrary to our recommendation, to exercise its discretion to decline to hear the remainder of the case on the merits,[12] see p. 11, *infra*, it would be proper to affirm summarily the court of appeals' partial invalidation of

[12] If the Court determines, as we recommend, to consider the rezoning issue on the merits, and thus to review in that context the issue of an intent versus an effects test under Title VIII, we urge the Court simply to note probable jurisdiction, and defer judgment on any aspect of the merits until after briefing and argument.

Section 198-20 of the Code of the Town of Huntington. We believe that such an action would be appropriate, however, only to the extent that it made clear that no determination of the proper burden of proof under Title VIII was thereby implied.

2. Such a disposition of the issue on which appellate jurisdiction is predicated would not dispose of the Town's challenge to the court of appeals' order that it rezone the land in issue for multi-family housing. Indeed, the Town primarily emphasizes the rezoning issue in its jurisdictional statement. See J.S. 1-5, 28-30. While this Court need not review the rezoning issue simply because the Court's appellate jurisdiction has been invoked with regard to the accompanying issue of the invalidation of the ordinance, the Court may appropriately exercise its discretion to reach and decide the remaining issue in the case. See *Davis* v. *Scherer*, 468 U.S. 183, 189-190 & n.7 (1984); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4037, at 62-64 (1988).[13] We believe that the Court should do so here.

The exercise of discretion in the immediate context operates in the same manner that is appropriate for determining whether to grant certiorari. Factors weighing against such an exercise of this Court's discretion are readily identifiable.

First, while the Town has technically preserved the position that an intent test should be applied with regard to the rezoning decision, it appears that the argument for that position has been pressed in an ambiguous and internally

[13] There is an "overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (footnote omitted). See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (referring to Court's practice of strictly construing statutes authorizing appeals).

inconsistent manner. The Town defended its refusal to rezone principally on the ground that plaintiffs had not properly applied for rezoning. See J.S. 4, 12-13, 15, 28; J.S. App. 79a-80a; Mar. 3, 1988 Tr. of Oral Arg. 30-31, 36-37; R. A-39. Its repeated reference to the *McDonnell-Douglas* test was directed primarily to the point that plaintiffs had failed to satisfy a critical element of the prima facie case—the requirement of application. Further, the Town conceded below that a discriminatory effect standard applied to plaintiffs' challenge to the zoning ordinance and argued only that the *McDonnell Douglas* test governed plaintiffs' rezoning claim. See Appellees' C.A. Br. 26-47; J.S. App. 16a-17a, 62a-63a. More to the point, the Town's apparent assertion of two distinct standards under the Fair Housing Act leaves substantial uncertainty about whether and on what basis it is claiming that one must ever prove intentional discrimination. The Town's jurisdictional statement itself contains little reference to that point. Compare J.S. at i with J.S. 20-28.[14]

Further, this is not a case presenting a sharp conflict in the circuits. The courts of appeals have consistently held that the Fair Housing Act does not require proof of intentional discrimination.[15] And, while there are some

---

[14] In analogous circumstances, this Court has declined to review cases where the

> issues * * * remain unfocused because they [were] not pressed * * * with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation * * *.

United States v. *Fruehauf*, 365 U.S. 146, 157 (1961).

[15] *E.g.*, *Hanson* v. *Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur* v. *City of Toledo*, 782 F.2d 565, 575 (6th Cir. 1986); *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d 126, 146-149 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977) (*Arlington Heights II*), cert. denied, 434 U.S. 1025 (1978); *United States* v. *City of Black Jack*, 508 F.2d 1179, 1184-1187 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).

This Court has not decided what proof the plaintiff must present to establish unlawful discrimination under Title VIII. Cf. *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that a municipality's refusal to rezone a parcel of land violated the Equal Protection Clause only upon a showing of purposeful discrimination; remanding the case for consideration of whether the village had violated Title VIII).

troublesome discrepancies among the courts regarding the appropriate standard for evaluating the defendant's justifications, these differences do not constitute a clear conflict.[16]

Notwithstanding these considerations, we urge the Court to exercise its discretion to review the court of

---

[16] In *Arlington Heights II*, 558 F.2d at 1290, the Seventh Circuit cautioned courts to exercise discretion when considering Title VIII actions premised only on discriminatory effect and instructed courts to evaluate the strength of the defendant's "interest" in taking the challenged action. The Third Circuit, in *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d at 149, agreed that courts must use their discretion when deciding such lawsuits. Moreover, the *Rizzo* court fleshed out the standard for evaluating the defendant's proffered justification for the challenged action (*ibid.* (footnote omitted)):

> a justification must serve * * * a legitimate, bona fide interest of the * * * defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

The Eighth Circuit, although using the phrase "compelling governmental interest" in *United States* v. *City of Black Jack*, 508 F.2d at 1185, to describe the defendant's burden, actually adopted a standard substantially similar to that later adopted by the Third Circuit in *Rizzo*. See *id.* at 1186-1187; see also *Hanson* v. *Veterans Admin.*, 800 F.2d at 1386 ("showing of a significant discriminatory effect" establishes violation of Title VIII).

appeals' rezoning decision holding that an effects rather than an intent test is applicable under Title VIII. We reach that conclusion based on the importance of the issue and the incorrectness of the decision below.

The principal operative provision of Title VIII (§ 804(a), 42 U.S.C. 3604(a)), makes it unlawful

> [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

Although proscribing a broad range of conduct, Congress limited that proscription to action taken "because of race."[17] The words "because of" plainly connote a causal connection between the housing-related action and the person's race or color. The proscribed action must have been caused, at least in part, by the individual's race, which strongly suggests a requirement of discriminatory motivation.[18] See *Personnel Administrator* v. *Feeney*, 442

[17] Three of the other prohibitions set forth in the Fair Housing Act also pertain to actions taken "because of" race or color. See 42 U.S.C. 3604(b) (terms or conditions of sale or rental), 42 U.S.C. 3604(d) (representation of unavailability of property for sale or rental), and 42 U.S.C. 3605 (denial of financial assistance). One section, pertaining to real estate advertising, bars any indication of "preference, limitation, or discrimination based on race, color * * *" (42 U.S.C. 3604(c)), and another, relating to participation in multiple listing services, prohibits discrimination "on account of" race or color (42 U.S.C. 3606). A final section makes it illegal to attempt to induce any person to sell or rent "by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race [or] color" (42 U.S.C. 3604(e)).

[18] Interpretation of similar or related language in various civil rights statutes does not resolve the meaning of Title VIII's "because of"

U.S. 256, 279 (1979). An action taken because of some factor other than race, *i.e.*, financial means, even if it causes a discriminatory effect, is not an example of the intentional discrimination outlawed by the statute.[19]

phrasing. On the one hand, Congress has demonstrated its ability unambiguously to adopt an effects test when it wishes to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for example, Congress required covered jurisdictions to seek preclearance of any voting change and to show that such a change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *."

In holding that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, before its amendment in 1982, required a showing of purposeful discrimination, the Court did not discuss that provision's requirement that discriminatory action be taken "on account of race." See *City of Mobile* v. *Bolden*, 446 U.S. 55, 60-65 (1980); see also *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits exclusion from participation in federal programs "on the ground of race," requires proof of discriminatory intent).

At the same time, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the Court construed the "because of" language in 42 U.S.C. 2000e-2(a)(2) as prohibiting employment practices that had discriminatory effects and rejected the contention that the language barred only intentional discriminatory practices. See 401 U.S. at 432. The Court has twice reserved the question whether 42 U.S.C. 2000e-2(a)(1), which contains "because of" phrasing, requires a showing of discriminatory intent. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 137 (1976); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 144 (1977).

[19] The courts of appeals have not presented a plausible alternative reading of the statutory language. In *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d at 146, for example, the court acknowledged that the " 'because of race' language might seem to suggest that a plaintiff must show some measure of discriminatory intent," but rejected this logical consequence in part because such a requirement would unduly burden Title VIII plaintiffs. See *id.* at 146-147. Similarly, in *Arlington Heights II*, 558 F.2d at 1288, the court noted that "[t]he major

The legislative history reinforces the understanding that Congress intended to require a showing of intentional discrimination.[20] Neither supporters nor opponents suggested that the legislation would ban local zoning regulations merely because they had a racial effect, without any showing that the local government intended to discriminate. Rather, the legislative history shows that Congress sought to eliminate intentional refusals to sell or rent housing because of the race of the renter or buyer and believed that financial ability should remain the most important factor in property transactions. Members of Con-

---

obstacle to concluding that action taken without discriminatory intent can violate [Title VIII] is the phrase 'because of race' * * *." The court, however, proceeded to embrace "[t]he broad view * * * that a party commits an act 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent" (*ibid.*). This reasoning is directly at odds with *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979), where this Court, in defining "discriminatory purpose," stated (*id.* at 279 (citation and footnotes omitted)) that the phrase

> implies more than intent as volition or intent as awareness of consequences * * *. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

[20] Because Title VIII, as enacted, was offered as a floor amendment, there are no committee reports. The legislative history consists primarily of statements by representatives and senators on their respective floors. Congress also held hearings, the record of which further supports reading Title VIII as requiring intentional discrimination. See *Fair Housing Act of 1967: Hearings Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 22-23 (1967) (remarks of Sen. Mondale) (bill is "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or [sic] does not apply to zoning requirements, ordinances, and the rest").

gress emphasized that the bill was designed to make financial ability, rather than race, the principal qualification for purchasing or renting housing. See, *e.g.*, 114 Cong. Rec. 2277 (1968) (Sen. Mondale).

Senator Mondale, a leading sponsor of the legislation, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refuses to sell to someone solely on the basis of race." (114 Cong. Rec. 4974 (1968)). Senator Hart echoed these sentiments (see *id.* at 4976). Senator Mondale also emphasized the limits of the bill's prohibitions (*id.* at 5643):

> The bill permits an owner to do everything that he could do anyhow with his property * * *, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color, and that is all * * *.

Not only do the statute's language and legislative history show that a violation of Title VIII requires intentional discrimination, substantial practical problems result if this requirement is discarded. In particular, the courts have acknowledged the difficulties in placing meaningful limits on the discriminatory effect standard of liability. See, *e.g.*, *Resident Advisory Bd.* v. *Rizzo*, 564 F.2d at 148-149; J.S. App. 23a. While proponents of such a standard have turned to Title VII as a model, "in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related" (J.S. App. 23a).[21] The hundreds of zoning decisions made by

---

[21] Courts which adopt the discriminatory effect standard have relied on two aspects of the legislative record. See, *e.g.*, *Arlington Heights II*, 558 F.2d at 1289-1290. The first is the language of 42 U.S.C. 3601, stating that the purpose of Title VIII is "to provide,

localities every year inevitably involve a mix of factors, some objective, such as traffic or sewage concerns, and some aesthetic, such as density and recreation concerns. Indeed, intangible factors that contribute to the quality of life in a community are legitimate subjects of zoning regulations entitled to judicial deference. See *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974). The importance of permitting individuals to shape the communities in which they live advises against invalidating zoning decisions enacted without discriminatory intent. And the subjective nature of many of the goals served by zoning renders judicial review of such zoning decisions particularly difficult. The drifting away from the statute's language requiring intentional discrimination has only exacerbated the inherent difficulties of this judicial function.

---

within constitutional limitations, for fair housing throughout the United States." The second is Senator Mondale's statement that Congress designed the Act to create "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968); see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The first statement appears to offer little but a truism and the second, although stating an admirable goal, does not address the means of achieving it. The argument that the ambitious goals of Title VIII require an expansive reading of the statute to include a discriminatory effect standard hardly surmounts the obstacles posed by the statute's plain language and legislative history.

Congress is currently considering legislation designed to strengthen enforcement of the Fair Housing Act by permitting persons aggrieved by housing discrimination to file administrative claims subject to judicial review. The proposed legislation would also broaden the enforcement authority of the Attorney General and HUD. See H.R. Rep. 100-711, 100th Cong., 2d Sess. (1988).

CONCLUSION

We urge the Court to note probable jurisdiction. However, should the court be disinclined as a matter of its discretionary jurisdiction to reach the rezoning issue, it should summarily affirm the invalidation of Section 198-20 of the Code of the Town of Huntington (on which the effects versus intent test issue has not been preserved), making clear at that time that it is declining to reach the other issues presented in the case. See *Davis* v. *Scherer*, 468 U.S. at 190 n.7.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WM. BRADFORD REYNOLDS
Assistant Attorney General
MARK R. DISLER
ROGER CLEGG
Deputy Assistant Attorneys General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
DAVID K. FLYNN
WILLIAM R. YEOMANS
Attorneys

JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60526

AMICUS CURIAE

BRIEF

MOTION FILED
JUN 2 0 1988

(4)

#87-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

-v.-

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NEW YORK PLANNING FEDERATION IN SUPPORT OF JURISDICTION

TERRY RICE
Attorney for the New York Planning Federation as *Amicus Curiae*

Blackburn, Rice & Matanle
One Executive Boulevard
P.O. Box 59
Suffern, New York 10901
(914) 357-6000

#87-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

-v.-

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The New York Planning Federation (hereinafter referred to as the "Planning Federation"), hereby respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of the Court's noting probable jurisdiction of the appeal of the

Town of Huntington in the above-captioned appeal. This motion and brief are filed on behalf of the Planning Federation and the New York local governments, planning boards and zoning boards of appeal which comprise its membership. The interest of the Planning Federation in this case is set forth in the Interest of the Amicus Curiae section of the attached brief.

The Planning Federation submits that its brief can assist the Court in evaluation of the importance of the detrimental impact of the Second Circuit's decision herein on rational zoning and planning. The amicus brief seeks to illustrate the broader implications of the Second Circuit's decision and the manner in which it will affect countless municipalities and interests other than those represented by the parties to the litigation. In addition, the brief can demonstrate the intrusive and inappropriate effect of the decision on the role of municipal governing bodies which make legislative determinations on the most appropriate zoning designation of territory in consideration of local planning and environmental conditions. The brief also depicts the manner in which the proper and traditional role of local planning boards in rendering zoning designation recommendations to the legislative body and in administering the zoning laws will be adversely curtailed.

As a consequence of the desire to balance the need to preserve the single-family character of existing residential neighborhoods with the demand for affordable housing, the *amicus curiae* brief will assist the Court in evaluating the nationwide importance and impact of the decision in this case and in assessing the deference which should be accorded to those local legislative bodies and planning boards which endeavor to fairly evaluate local and regional needs and to fairly formulate and administer local zoning laws.

Appellants' letter consenting to the filing of this brief is filed with the Clerk of this Court simultaneously herewith. The attorney for the appellees has refused consent to file this *amicus curiae* brief although such consent was requested.

Wherefore, the undersigned respectfully urges the Court to grant the Planning Federation leave to file the annexed brief as *amicus curiae* in support of the Court noting probable jurisdiction of the appeal of the Town of Huntington herein.

Dated: Suffern, New York
June 20, 1988

Respectfully submitted

TERRY RICE
Attorney for the New York Planning Federation as *Amicus Curiae*

Blackburn, Rice & Matanle
One Executive Boulevard
P.O. Box 59
Suffern, New York 10901
(914) 357-6000

TABLE OF CONTENTS

Interest of the amicus curiae 1

Argument 3

Conclusion 9

TABLE OF AUTHORITIES

Cases

Albright v. Town of Manlius, 34 A.D.2d 419, 312 N.Y.S.2d 13 (4th Dep't 1970), *aff'd*, 28 N.Y.2d 108, 268 N.E.2d 785, 320 N.Y.S.2d 50 (1971) 4

Baddour v. City of Long Beach, 279 N.Y.167, 18 N.E.2d 18 (1938), *reh. den.*, 279 N.Y. 794, 19 N.E.2d 90 *app. dism.*, 308 U.S. 503 (1939) 6

Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975) 8

Berman v. Parker, 348 U.S. 26 (1954) 5

Dowsey v. Village of Kennsington, 257 N.Y. 221, 177 N.E. 427 (1931) 8

Dun-Bar Realty Co. v. City of Utica, 57 A.D.2d 51, 394 N.Y.S.2d 913, (4th Dep't 1977), *aff'd*, 44 N.Y.2d 1002, 380 N.E.2d 328, 408 N.Y.S.2d 502 (1978) 4

Fox Meadow Estates, Inc. v. Culley, 233 App. Div. 250, 252 N.Y.S.2d 178 (2d Dep't 1931), *aff'd*, 261 N.Y. 506, 185 N.E.2d 714 (1933) 4

Golden v. Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *app. dism.*, 409 U.S. 1003 (1972) 5

Headley v. Fennell, 124 Misc. 886, 210 N.Y.S. 102 (Sup. Ct. Monroe Co. 1924), *aff'd*, 214 App. Div. 810, 210 N.Y.S.2d 861 (4th Dep't 1925) 6

Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 6, 359 N.E.2d 337, 390 N.Y.S.2d 827 (1976) 5

Lincoln Trust Co. v. Williams Building Corporation, 229 N.Y. 313, 128 N.E. 209 (1920) 3

Lindsey v. Normet, 405 U.S. 56 (1972) 7

Marcus Associates v. Town of Huntington, 45 N.Y.2d 505, 382 N.E.2d 1323, 410 N.Y.S.2d 546 (1978) 4

McMinn v. Town of Oyster Bay, 66 N.Y.2d 550, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985) 6

Mary Chess, Inc. v. City of Glen Cove, 18 N.Y.2d 205, 216 N.E.2d 406, 273 N.Y.S.2d 46 (1966) 5

Robert E. Kurzius, Inc. v. Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980), *cert. denied*, 450 U.S. 1042 (1981) 4

Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951) 4

Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949) 5

Suffolk Housing Services v. Town of Brookhaven, 109 A.D.2d 323, 491 N.Y.S.2d 396 (2d Dep't 1985), *aff'd*, 70 N.Y.2d 122, 511 N.E.2d 67, 517 N.Y.S.2d 924 (1987) 8

Town of Huntington v. Park Shore Country Day Camp, 47 N.Y.2d 61, 390 N.E.2d 282, 416 N.Y.S.2d 774 (1979) 4

Udell v. Haas, 21 N.Y.2d 463, 469-70, 235 N.E.2d 897, 288 N.Y.S.2d 888, 893-94 (1968) 7

United States v. Carolene Products, Co., 304 U.S. 144 (1938) 5

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 6

Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926) 4

Wiggins v. Town of Somers, 4 N.Y.2d 215, 149 N.E.2d 869, 173 N.Y.S.2d 579 (1958) 5

Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925) 5

Statutes and Regulations

Environmental Conservation Law, Article 8 9

General City Law section 20(25) 7

Town Law section 263 7

Village Law section 7-704 7

6 NYCRR Part 617 9

#87-1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

-v.-

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE NEW YORK PLANNING FEDERATION IN SUPPORT OF JURISDICTION

INTERESTS OF THE AMICUS CURIAE

The New York Planning Federation (hereinafter referred to as the "Planning Federation") respectfully submits this brief, pursuant to Rule 36 of the Rules of this Court. The membership of the Planning Federation includes approximately 9,000 individuals

who are members of planning boards and zoning boards of appeal in over 500 municipalities throughout the State of New York. The Planning Federation was formed in 1937 with the objectives:

1. To provide education and information in Regional, Urban, Rural and Local Planning so that sound planning practices and effective administration of planning and zoning will lead to orderly growth and development of communities;
2. To serve as a resource for information on the purposes and techniques of planning, zoning and land use control;
3. To provide a forum for the exchange of experiences in the handling of the common problems of New York communities; and
4. To serve as a state-wide voice for the planning and zoning boards in the State of New York.

The Planning Federation is interested in this care because planning boards and zoning boards of appeal in New York's municipalities have been mandated by the state Legislature to play a critical role in the consideration of planning and zoning actions. *See*, New York Town Law §§267, 272-a, 274, 276; and Village Law §§7-712, 7-722, 7-728, 7-738. It is one of the central precepts of planning and zoning that a municipality is afforded the broadest freedom and discretion in deciding where within its borders it wishes to establish multi-family, single-family, industrial and commercial uses. The ability of local governments to exercise zoning and planning authority for the benefit of the entire community pursuant to well-settled New York law has been undermined by the decision of the United States Court of Appeals for the Second Circuit. The Second Circuit's interpretation of the Fair Housing Act will, in many instances, require that sound planning principles be abandoned, that local elected and planning officials be prevented from implementing the zoning design that best advances the health, safety and welfare of the citizenry and the ability of local zoning officials to promote in appropriate fashion the establishment and maintenance of single-family neighborhoods be compromised.

The Planning Federation, which has sought to promote sound, rational and just community planning for more than 50 years, believes that the impact of the decision appealed from herein jettisons long-established principles of municipal zoning which

have for many years resulted in orderly development, the appropriate preservation of property and family values and the accommodation of the diverse housing needs of each community and region.

ARGUMENT

By determining that it is merely necessary to statistically demonstrate a discriminatory impact of a facially neutral zoning ordinance in order to prove a prima facie Title VIII claim, and thereby to shift the burden to a municipal defendant to demonstrate bona fide and legitimate justifications for its action with no less discriminatory alternative available, the Second Circuit has demolished years of preferential treatment of zoning enactments and has burdened municipal defendants with a justification standard which, except in the most extraordinary circumstances, can never be satisfied. Such a holding essentially renders invalid any zoning law which impacts in some statistical manner on a minority group, in spite of the otherwise valid intent, purpose and nature of a zoning law. Good faith and the application of rational planning techniques become irrelevant. Zoning, thereby, becomes primarily a tool of social change and not, as has been intended, a device whereby safe, healthful, well-ordered and pleasant communities are planned. The Planning Federation does condemn in the strongest terms any intentional subversion of the zoning and planning process in order to discriminate against any minority, group or individual. The decision of the Second Circuit, however, penalizes all municipalities and permits multi-family rezoning upon demand in those municipalities where a statistically disparate impact can be fathomed. Such an intrusive remedy is an inappropriate sanction to be inflicted on the thousands of well-intentioned municipalities, the officials who endeavor in good faith to plan livable communities and, most importantly, the citizens who seek to raise their families in these communities.

It is submitted that an explanation of the zoning scheme and existing case law in New York will demonstrate the full implications of the Second Circuit decision. It should be noted that the New York experience is particularly relevant because New York municipalities have been in the mainstream of zoning techniques and have had long experience in sound zoning and planning, the first comprehensive zoning law having been enacted by the City of New York in 1916. *See Lincoln Trust Co. v. Williams Building*

Corporation, 229 N.Y. 313, 128 N.E. 209 (1920).

It has long been recognized by the courts that a municipal legislative body is most familiar with the particular needs of its community. *Albright v. Town of Manlius*, 34 A.D.2d 419, 312 N.Y.S.2d 13, 17-18 (4th Dep't 1970), *aff'd*, 28 N.Y.2d 108, 268 N.E.2d 785, 320 N.Y.S.2d 50 (1971). In recognition of this familiarity with local requirements, a zoning ordinance is presumed to be supported by facts known to the municipal legislative body. *Dun-Bar Realty Co. v. City of Utica*, 57 A.D.2d 51, 394 N.Y.S.2d 913, 918 (4th Dep't 1977), *aff'd*, 44 N.Y.2d 1002, 380 N.E.2d 328, 408 N.Y.S.2d 502 (1978). Accordingly, "[t]he power of a municipality to determine for itself what plans are necessary to promote the public health, morals, safety, and the welfare, convenience, and general prosperity of its people is a legislative question, which may not be interfered with by the courts, except in rare circumstances." *Fox Meadow Estates, Inc. v. Culley*, 233 App. Div. 250, 252 N.Y.S.2d 178, 179-180 (2d Dep't 1931), *aff'd*, 261 N.Y. 506, 185 N.E.2d 714 (1933). As a result, the power of a municipality to establish zoning regulations or amend the same in a manner reasonably aimed to promote the general welfare cannot be questioned. *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951).

It follows then that the enactment of a zoning ordinance is a valid exercise of the police power if its restrictions are not arbitrary and they bear a substantial relation to the promotion of the health, safety or welfare of the community. *Village of Euclid v. Ambler Realty Company*, 272 U.S. 365, 395 (1926); *Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d 338, 343, 414 N.E.2d 680, 434 N.Y.S.2d 180, 182 (1980), *cert. denied*, 450 U.S. 1042 (1981); *Rodgers v. Village of Tarrytown*, 302 N.Y. at 121, 96 N.E.2d at 733. This Court and the New York appellate courts have long recognized that zoning ordinances are invested with an exceedingly strong presumption of constitutionality and legitimacy. *Village of Euclid v. Ambler Realty Company*, 272 U.S. at 388; *Town of Huntington v. Park Shore Country Day Camp*, 45 N.Y.2d 61, 65, 390 N.E.2d 282, 416 N.Y.S.2d 774, 775-76 (1979); *Marcus Associates v. Town of Huntington*, 45 N.Y.2d 505, 382 N.E.2d 1323, 410 N.Y.S.2d 546, 547 (1978). This Court has recognized that if the validity of the zoning classification is fairly debatable, it must be permitted to stand. *Village of Euclid v. Ambler Realty Company*, 272 U.S. at 388; *see also Robert E. Kurzius, Inc. v. Village of Upper Brookville*, 51 N.Y.2d at 344, 434 N.Y.S.2d at 183; *Rodgers v. Village of Tarrytown*, 302 N.Y. at

121, 96 N.E.2d at 733; *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 377, 285 N.E.2d 291, 301, 334 N.Y.S.2d 138, 151, *app. dism.*, 409 U.S. 1003 (1972). Consequently, a party seeking to challenge a particular classification bears a very heavy burden of proof beyond a reasonable doubt. *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 6, 11, 359 N.E.2d 337, 390 N.Y.S.2d 827, 830 (1976); *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 218, 149 N.E.2d 869, 173 N.Y.S.2d 579, 582 (1958).

In scrutinizing a particular zoning provision or law, the "courts must heed to their limited role, and scrupulously avoid entering into the legislative realm . . ." *Marcus Associates v. Town of Huntington*, 45 N.Y.2d at 506, 410 N.Y.S.2d at 548. The local legislative judgment must, in fact, be supported by the courts if there is "any state of facts either known or which could reasonably be assumed" to justify the enactment. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938); *see also Town of Huntington v. Park Shore Country Day Camp*, 47 N.Y.2d at 66, 416 N.Y.S.2d at 776. In particular, "the classification scheme devised by the local legislature would have to be sustained if it could be said to be 'reasonably related to some manifest evil which, however, need only be reasonably apprehended.'" *Town of Huntington v. Park Shore Country Day Camp*, 47 N.Y.2d at 65-66, 416 N.Y.S.2d at 776 (quoting *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d 7, 11, 359 N.E.2d 337, 341, 390 N.Y.S.2d 827, 830 (1976)). A zoning ordinance is invalid only if it is not justified under the police power by any reasonable interpretation of the facts. *Mary Chess, Inc. v. City of Glen Cove*, 18 N.Y.2d 205, 209, 219 N.E.2d 406, 273 N.Y.S.2d 46, 48 (1966); *Shepard v. Village of Skaneateles*, 300 N.Y. 115, 118, 89 N.E.2d 619, 620 (1949). It is only as a last resort that a zoning enactment will be struck down. *Marcus Associates v. Town of Huntington*, 45 N.Y.2d at 505, 410 N.Y.S.2d at 547; *Lighthouse Shores v. Town of Islip*, 41 N.Y.2d at 11, 390 N.Y.S.2d at 830; *Wiggins v. Town of Somers*, 4 N.Y.2d at 219, 173 N.Y.S.2d at 582.

This Court has recognized that "[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced . . ." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Accordingly, the preservation of the established character of an area has long been recognized as a permissible and salutary goal in enacting zoning regulations. *Marcus Associates v. Town of Huntington*, 45 N.Y.2d at 507, 410 N.Y.S.2d at 548; *Wulfsohn v. Burden*, 241

N.Y. 288, 150 N.E. 120 (1925). In the most cogent statement of the laudatory goal of zoning, Mr. Justice Douglas stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs ... The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

Similarly, the New York Court of Appeals has recognized that legitimate governmental purposes are furthered by a zoning ordinance which fosters "the preservation of the character of traditional single-family neighborhoods, reduction of traffic and parking problems, control of population density and prevention of noise and disturbance." *McMinn v. Town of Oyster Bay,* 66 N.Y.2d 550, 549, 488 N.E.2d 1240, 498 N.Y.S.2d 128, 131 (1985).

In order to promote these important and legitimate aims, the courts have sustained use regulations which have excluded multi-family dwellings from residential neighborhoods. *See Baddour v. City of Long Beach,* 279 N.Y.167, 18 N.E.2d 18 (1938), *reh. den.* 279 N.Y. 794, 19 N.E.2d 90, *app. dism.,* 308 U.S. 503 (1939); *Wulfson v. Burden,* 241 N.Y. 288, 150 N.E. 120 (1925) ("zoning authorities should have the right in a residential district to promote these purposes [of safe, healthful and comfortable family life] and to protect the people desiring to enjoy these conditions by excluding big apartment houses . . ." *Id.* at 301, 150 N.E. at 123); *Headley v. Fennell,* 124 Misc. 886, 210 N.Y.S. 102 (Sup. Ct. Monroe Co. 1924), *aff'd,* 214 App. Div. 810, 210 N.Y.S. 861 (4th Dep't 1925). These decisions recognize that it is within the province of local legislative bodies to conclude that multi-family dwelling units and one- or two-family residences are not complimentary. If a zoning ordinance permits the construction of multi-family dwellings, a zoning law may legitimately determine that such uses are not conducive to fostering the atmosphere that is sought to be promoted in the single-family residential districts.

As Mr. Justice Marshall recognized in his dissent in *Village of Belle Terre v. Boraas,* "zoning is an important and complex function [and] may indeed be the most essential function

performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." 416 U.S. at 13. Given the presumptions of validity set forth above and the recognized right of municipalities to design reasonable regulations to protect the integrity of its single-family zoning, the *Huntington* decision has, in essence, undermined 60 years of zoning and municipal jurisprudence. It has, in effect, relegated zoning and municipal planning to the same questionable status it held before this Court sanctioned its validity in *Euclid.* Whenever some statistical evidence demonstrates that a minority group has suffered by virtue of any of the many factors which may influence how, when and where housing will be constructed, the validity of a comprehensive, well-conceived zoning law will be called into question. The historic and well-established presumptions of validity will be ignored and the municipality will be required to justify its zoning scheme under a standard which, absent environmental or other unusual circumstances, it will be unable to satisfy. Although housing has never been classified as a fundamental right, *Lindsey v. Normet,* 405 U.S. 56, 73-74 (1972), the *Huntington* decision has elevated that interest to a position in which a well-conceived and planned zoning law is, in fact, presumed invalid under Title VIII.

Such a result is also contrary to the requirement that zoning laws be adopted pursuant to a comprehensive plan. *Udell v. Haas,* 21 N.Y.2d 463, 469-70, 235 N.E.2d 897, 288 N.Y.S.2d 888, 893-94 (1968). A comprehensive plan which connotes "a full consideration of the problems presented and reasonable and uniform provisions to deal with them, which tend to promote the general community welfare," *Albright v. Town of Manlius* 312 N.Y.S.2d at 18, is the jurisdictional prerequisite for municipal exercise of the delegated zoning authority. Village Law section 7-704; Town Law section 263; General City Law section 20(25) (denoted in the General City Law as a "well-considered plan"). "[T]he comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land. It is the insurance that the public welfare is being served . . ." *Udell v. Haas,* 21 N.Y.2d at 469, 288 N.Y.S.2d at 893-94. The Court of Appeals further determined in *Udell v. Haas,* the seminal New York decision on the requirement of a comprehensive plan, that:

> One of the key factors used by our courts in determining whether the statutory requirement has been met is whether forethought has been given to the community's

> land use problems. (citations omitted) Where a community, after a careful and deliberate review of the present and reasonably foreseeable needs of the community, adopts a general development policy for the community as a whole . . . courts can have some confidence that the public interest is being served.

21 N.Y.2d at 470, 288 N.Y.S.2d at 894.

The judicial rejection of a municipality's careful planning for the needs of the community and imposition of a use which the community's planners concluded was inappropriate in a particular zone, flies in the face of well-established principles of judicial deference to zoning and planning decisions and, more importantly, undermines the theoretical basis for zoning. The *Huntington* decision, in essence, sanctions a form of judicial "spot zoning." Accordingly, a municipal decision that certain areas of the community should be devoted to use as one- or two- family dwelling neighborhoods should not so lightly be disregarded.

That is not to say that a community may ignore the needs of individuals seeking other forms of housing. Long before *Berenson*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975), the New York Court of Appeals recognized that municipalities may not allow only single-family residences in order to exclude other types of housing. As early as 1931, the Court of Appeals invalidated a zoning ordinance which restricted an entire village to one use district permitting only single-family dwellings. *Dowsey v. Village of Kennsington*, 257 N.Y. 221, 177 N.E. 427 (1931). In *Golden v. Planning Board of the Town of Ramapo*, 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152, the Court of Appeals warned municipalities that it would not "countenance . . . under any guise . . . community efforts at immunization or exclusion." In *Berenson*, the Court of Appeals recognized that in addition to satisfying the present and future needs of the residents of a community, a municipality must consider the future housing needs of the region in formulating its zoning law. *Berenson* and its progeny require that zoning ordinances make possible an array of housing within a particular region for those who want and can afford it. *Suffolk Housing Services v. Town of Brookhaven*, 109 A.D.2d 323, 331, 491 N.Y.S.2d 396, 402 (2d Dep't 1985), *aff'd*. 70 N.Y.2d 122, 511, N.E.2d 67, 517 N.Y.S.2d 924 (1987). Emphasizing that it will not tolerate zoning as subterfuge for exclusion, the Court of Appeals has held that "[i]mplicit in our rulings is a recognition of the principle that a municipality may not

legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination." *Suffolk Housing Services v. Town of Brookhaven*, 70 N.Y.2d at 129, 517 N.Y.S. 2d at 926. Accordingly, although great deference must be paid to the zoning decisions of local governments in solving local concerns, a remedy and commitment exists if the zoning authority has neglected to consider regional housing requirements or, in those rare instances, if a municipality intends to utilize its zoning authority for exclusionary purposes.

Additionally, the granting of site-specific relief by the Second Circuit is an unprecendented usurpation of the legislative function. Except in the rarest of instances in which a pervasive record of bad faith exists, judicial rezoning or granting of a "builders remedy" is not sanctioned. Such a draconic remedy ignores a municipality's comprehensive plan, the effect of a rezoning and specific proposal on neighboring residents and the effect of the proposal on a community's infrastructure and public services. It completely circumvents the State Environmental Quality Review Act, Environmental Conservation Law, Article 8; 6 NYCRR Part 617, a statute which has been determined to be of the highest priority in the State of New York and which is to be implemented to the fullest extent possible so as to eliminate and mitigate against undesirable environmental impacts of a proposal. It forestalls the possibility of the imposition of reasonable conditions to lessen the impacts of a proposal on the community and on residential neighbors. The introduction of an inconsistent use to an area, moreover, may compel acceptance of additional inconsistent uses. In short, the granting of such a remedy inappropriately usurps the legitimate function of the local legislative body. It is imperative that this Court review this issue.

Accordingly, the Planning Federation urges that this Court note probable jurisdiction of the appeal of the Town of Huntington. The decision and issues sought to be raised by the appellants greatly affect the manner in which communities are planned and zoning is administered. The issues are of such concern to the Planning Federation that, should probable jurisdiction be noted, it intends to seek leave to file an *amicus curiae* brief on the merits.

CONCLUSION

The jurisdictional statement submitted by the appellants aptly demonstrates that a direct appeal is jurisdictionally appropriate

and that a conflict exists among the various Circuits with respect to the issues herein. The Planning Federation asserts that the issues sought to be raised are of great concern to its members and will greatly influence zoning and planning in the State of New York and throughout the country. In effect, the ability of municipalities to rationally plan their communities is at issue.

Accordingly, it is respectfully urged that the Court note probable jurisdiction of the appeal of the Town of Huntington.

Dated: Suffern, New York
June 20, 1988

/S/TERRY RICE
TERRY RICE
Attorney for the New York Planning Federation as *Amicus Curiae*

Blackburn, Rice & Matanle
One Executive Boulevard
P.O. Box 59
Suffern, New York 10901

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK.

No. CV-81-0541.

Sept. 9, 1987

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Housing Help, Inc., Mabel Harris, Perrepper Crutchfield, and Kenneth L. Cofield,

Plaintiffs,

v.

THE TOWN OF HUNTINGTON, NEW YORK, Kenneth C. Butterfield, Claire Kroft, Kenneth Deegan, Edward Thompson, and Joseph Clemente,

Defendants.

Richard F. Bellman, Steel Bellman & Levine, P.C., New York City, Charles F. Sanders, Nat. Ass'n for the Advancement of Colored People, Brooklyn, N.Y., for plaintiffs.

Richard C. Cahn, Cahn Wishod Wishod & Lamb, Melville, N.Y., for defendants.

MEMORANDUM AND ORDER

GLASSER, District Judge:

The complaint in this housing discrimination action was filed on February 23, 1981. Two of the claims from the initial complaint survive: (1) plaintiffs allege that the Town of Huntington, New York has violated title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.*, as well as the fourteenth amendment's equal protection clause and 42 U.S.C. §§ 1982 and 1983, by (a) restricting private construction of multi-family

housing units to an urban renewal area and (b) refusing to take action to provide multi-family zoning for the Matinecock Court development proposed by plaintiff Housing Help, Inc.; (2) plaintiffs also allege that the denial of multi-family zoning violates N.Y. Town Law § 261 (McKinney 1987), as construed in *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

The complaint also named as defendants the United States Department of Housing and Urban Development and its secretary. The federal defendants moved for judgment on the pleadings; the Huntington defendants moved to dismiss or for summary judgment. Holding that the plaintiffs lacked standing, the district court dismissed the complaint. *Huntington Branch NAACP v. Town of Huntington, New York*, 530 F.Supp. 838 (E.D.N.Y.1981).

The court of appeals reversed and remanded. 689 F.2d 391 (2d Cir.1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1523, 75 L.Ed.2d 947 (1983). The plaintiffs had not appealed the dismissal with respect to the federal defendants, *id.* at 393 n. 3, so the action proceeded against the Huntington defendants. After the ruling of the court of appeals, this action was reassigned to the undersigned.

On November 7, 1983, this court certified the case as a class action, with the class represented by plaintiffs defined as:

> All black, Hispanic and lower income persons in need of lower cost housing opportunities in Huntington and surrounding areas and who would qualify for residency in the proposed Matinecock Court and other Section 8 projects in Huntington, and who seek to reside in and insure opportunity for racially and economically integrated housing in Huntington.

"Section 8" is a reference to a new construction housing program authorized by 42 U.S.C. § 1437f.

A defense motion to dismiss or for summary judgment was denied on May 13, 1984. The action was tried, without a jury, from May 28, 1985 through June 14, 1985.

I. *Stipulations*

The parties have stipulated to the following facts. The 1980 census showed that the population of the Town of Huntington was 197,089, classified as follows: 187,794 whites, 6,183 blacks, 4,666 Hispanics, and 2,445 Asians. The census also showed that there were 51,793 families, classified as 49,662 white, 1,435 black, 1,073 Hispanic, and 542 Asian. Thus, Huntington's population was 3.35% black.

Certain HUD programs use "very low income" guidelines. These guidelines are set at approximately 185% of the poverty level.

In 1961 through 1963, as part of the "workable program" requirements of federal urban renewal statutes, and in coordination with the preparation of the Town's master plan, the Town's Planning Board caused various town-wide studies to be prepared to determine the condition of the available housing stock in the Town. The study identified 2,220 dwelling units that were termed inadequate and unsafe. The greatest concentration of these substandard dwelling units was in the area that subsequently became the urban renewal area. The study found 458 substandard housing units within a ½-mile radius of the Huntington railroad station. After the enactment of the Housing and Community Development Act of 1974 (HCDA), and based upon the findings of the 1961-63 study, the Town designated certain areas as community development areas (CDAs).

On March 4, 1964, the Town Board created the Public Housing District and rezoned the land upon which the public housing project known as Gateway Gardens is now located to the Public Housing District zoning classification.

In 1965, the Planning Board, pursuant to section 272-a of the New York Town Law, adopted a master plan for the Town. The master plan described, among other things, the decline in the Huntington Station area. It recommended slum clearance and redevelopment in that area, accompanied by provision of safe and adequate housing for displaced families. The master plan does not call for high density housing or multi-family dwellings at the intersection of Elwood and Pulaski Roads. The

intersection of Elwood and Pulaski is where plaintiff Housing Help, Inc. (HHI) possesses an option to build.

On May 26, 1966, the Town Board, acting pursuant to title I of the Housing Act of 1949 and article 15 of New York's General Municipal Law, adopted a resolution approving an urban renewal plan involving

> the acquisition of land in the project area; the demolition or removal of buildings and improvements; and the installation, construction or reconstruction of project improvements, to make land available for development or redevelopment by private enterprises or public agencies, as authorized by law and to carry out plans for a program of repair and rehabilitation of buildings or other improvements.

One of the Town Board's findings was that

> financial assistance under the provisions of Title I of the Housing Act of 1949, as amended, is necessary to enable the land in the Project area to be renewed in accordance with the Urban Renewal Plan for the Project area and, accordingly, the filing by the Local Public Agency of an application or applications for such financial assistance under Title I is hereby approved.

On July 21, 1966, the Town Board conducted a public hearing to consider amendments to the Building Zone Ordinance that would add provisions for garden apartments and a retirement community district. A hearing on the proposed R-RM zoning (which covers senior citizen housing) was held on that date. The Town Board created the R-RM District in August 1966 and rezoned real property owned by Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc. (the Methodist Church) to the new R-RM District in December 1966. The Methodist Church had applied for the zoning change to R-RM status.

The New York State Legislature established the Huntington Urban Renewal Agency, effective April 10, 1967, by enactment of chapter 222 of the laws of 1967. On June 6, 1967, the Town Board adopted a resolution approving Amendment No. 1 to

the Urban Renewal Project, NYR-164. On November 25, 1969, the Town Board adopted Amendment No. 2 to the urban renewal plan, which contained a Neighborhood Design Concept Plan, providing for "an integrated residential and commercial development" with a proposed pedestrian bridge over New York Avenue. This plan also called for garden apartments and office and commercial development on the northeast corner of Broadway and New York Avenue. On June 3, 1969, the Town Board established the R-3M Garden Apartment District. In February 1969, the Town Board had adopted height, area, and bulk regulations applicable to the proposed R-3M district. On December 30, 1969, upon recommendation of the Planning Board, the Town Board rezoned to R-3M the land upon which Walt Whitman Village is now located, and the land upon which the Town in 1980 proposed a 150-unit section 8 development at the northeast corner of the intersection of Route 110 and Broadway in Huntington Station.

Acting under its statutory authority, the Huntington Urban Renewal Agency entered into an agreement on July 22, 1971 with a partnership known as Melville Industrial Associates (MIA). The purpose of the agreement was to secure development of three contiguous parcels (Redevelopment Parcels 2, 3, and 25) within the Urban Renewal Area for multi-family dwellings, as part of the Urban Renewal Redevelopment Plan.

On February 15, 1972, the Town Board rezoned certain property located on the south side of Pulaski Road from R-40 Residence District to R-RM Retirement Community District and C-5 Planned Shopping Center District, in order to facilitate the construction of 300 units of senior citizen housing that became Paumanack Village and a shopping center adjacent thereto. This rezoning was upon the application of Raval Associates and Senior Citizens Housing Committee of Huntington, Inc., and took place after a recommendation by the Planning Board and a public hearing of the Town Board.

On May 9, 1972 and May 25, 1973, pursuant to the July 22, 1971 agreement concerning Redevelopment Parcels 2, 3, and 25, the Urban Renewal Agency conveyed to MIA the three contiguous parcels situated at the northeast corner of the intersection of New York Avenue and Broadway.

On January 25, February 1, and March 1, 1977, the Town Board held public hearings with regard to the Town's 1977 Community Development Block Grant (CDBG) application. On January 14, 1978, the Town Board conducted a public hearing regarding the 1978-79 CDBG application, and, on February 27, 1979, the Town Board held a public hearing regarding the 1980 CDBG application.

On July 20, 1978, Michael Miness, the director of the Huntington Community Development Agency (CDA), sent a letter to the residents of Huntington Station in the vicinity of the Lincoln School, informing them of the proposed Lincoln School project. On May 10, 1979, after a public hearing, the Planning Board approved the rezoning of the Lincoln School property to R-3M zoning, for the express purpose of constructing 30 units of section 8-assisted low income housing. The Lincoln School was situated outside the boundaries of the former urban renewal area of the Town, but inside an area that the Town had previously designated as a community development area. On June 5, 1979, the Town Board conducted a public hearing on the Lincoln School rezoning and publicly advertised the hearing. The CDA issued letters on June 5, 1979, advising the community of the Planning Board's recommendation for a change of zone of the Lincoln School property and of the impending zoning change. On June 26, 1979, the Town Board rezoned the Lincoln School property to R-3M.

On August 31, 1982, HHI's Board of Directors advised the CDA that it supported two-family construction in the East Fourth Street area only if the Town agreed to build one low income unit outside of the former urban renewal area for every unit built inside the area. On October 19, 1982, the Town Board decided not to agree to the conditions sought by HHI as a prerequisite for HHI's involvement in the project.

On June 2, 1980, the Town filed its application for preliminary approval of a proposed 150-unit section 8 project in tract 1110.02 in Huntington Station. A letter of that date from Town Supervisor Kenneth Butterfield to HUD requested pre-approval for an anticipated project of 150 to 175 housing units for families. In a letter dated July 10, 1980, Alan Weiner, HUD's Area Office Manager, notified Butterfield that HUD had preap-

proved section 8 funding for the 150-unit proposed low income housing project in Huntington Station. HUD pre-reserved $1,012,140 in fiscal year 1980 funds allocated to HUD's New York Area Office. As of the 1980 census, census tract 1110.02 had a population of 79.44% white, 17.02% black, 11% Hispanic, .17% Indian, and 1.44% Asian. The total exceeds 100% because the category "Hispanic" includes persons also listed in the white and black categories. On December 12, 1980, HHI's executive director advised HUD by letter that the HHI board "feels that [HUD's approval of the proposed 150-unit project in Huntington Station] goes against certain HUD regulations." HHI reiterated this position at its January 15, 1981 meeting with HUD.

By motion dated May 22, 1981, plaintiffs moved this court for a preliminary injunction restraining any further action with respect to the granting of funds for or contributing to construction of the proposed 150-unit section 8 housing development in the former urban renewal area of Huntington and enjoining HUD to maintain the section 8 funds allocated for the project available "for an alternative, non-discriminatory section 8 development in the Town of Huntington." At that time, the only other pending application for a section 8 new construction project in the Town was HHI's proposed Matinecock Court project. On August 28, 1980, HHI filed its application for section 8 funding for the Matinecock Court project, pursuant to a June 19, 1980 Notice of Funding Availability (NOFA). This application was filed after a meeting on July 29, 1980 with HUD's Deputy Area Director, who had invited HHI to file for a funding allocation. On October 9, 1980, James R. Dunne, the director of the CDA, reviewed HHI's application for section 8 assistance for the proposed Matinecock Court project. After listing a variety of problems he perceived with the application he wrote:

> In conclusion, this office cannot recommend an affirmative response to the proposal submitted by Housing Help/ National Housing Partnership based on the material reviewed due to the comments presented above.

The full text of Dunne's memorandum is reproduced in the margin.[1]

---

1 The memorandum stated:

We have received a developer's proposal for a 162 unit garden apartment, family housing development, proposed for a site at the intersection of Pulaski Road and Elwood Road in East Northport section of the Town. The developer for this complex is a joint venture between Housing Help, Inc. of Huntington and National Housing Partnership of Washington, D.C.

The proposed development contemplates a total of 162 subsidized units under the Section 8 Housing Assistance Program with tenants getting rent assistance through the Section 8 Program. Plans for the project show 32—1 Bedroom units, 83—2 Bedroom units, 35—3 Bedroom units and 12—4 Bedroom units.

This office has reviewed this proposal and hereby submits the following comments:

—The approved Housing Assistance Plan, both the Three Year Goal submitted with the CDBG 1979-80 Application and the Annual Goal submitted with the CDBG 1980-81 Application contain no "New Construction" units as a program goal. In order to accommodate said proposal, both Three Year and Annual HAP Goals will have to be amended in accordance with HUD regulations.

—The plan for development cannot be carried out within the existing single family R-40 (1 acre).

—The development is located at the intersecton of two heavily trafficked streets.

—The site plan presents a poor parking plan in terms of location with respect to the units, substandard in size and the lack of streets results in very poor fire protection access.

—The development is located adjacent to both the Long Island Railroad as well as a LILCO Substation. This is in addition to the heavy traffic conditions.

—The site plan shows recreation and/or play areas very inadequate for the number and type of dwelling units being proposed.

—The one and two-bedroom units are adequate in terms of size and layout.

—The three and four bedroom units are quite undersized; have a poor layout; bedrooms are much too small; living space is unrealistic; no storage; one full and two half baths for family of 6 to 8 is not realistic.

In conclusion, this office cannot recommend an affirmative response to the proposal submitted by Housing Help/National Housing Part-

On October 14, 1980, federal regulations obligated HUD to secure the comments of Supervisor Butterfield with regard to whether the Matinecock Court project was consistent with the Town's HAP. On December 9, 1980, Joan Flowers, President of the Concerned Citizens Association (CCA), transmitted letters of opposition regarding Matinecock Court to the Supervisor and the Town Board. On January 6, 1981, at a public hearing of the Town Board, Flowers, as President of the CCA, publicly opposed the Matinecock Court project. Also on January 6, the Town Board adopted a resolution stating that the Matinecock Court site was inappropriate for senior citizen housing. On March 2, 1981, the CCA wrote to HUD describing the community's negative reaction to the Matinecock Court project.

On April 17, 1984, HUD approved the Town's housing assistance plan (HAP) for 1982-85, which provided for 150 new, or substantially rehabilitated, housing units and 100 existing section 8 certificates. On August 31, 1984, HUD approved the Town's fiscal year 1983 CDBG submission with an entitlement amount of $1,342,000. On the same date, HUD advised the Town that additional CDBG funds of $289,000 were approved under provisions of the Jobs Bill.

---

nership based on the material reviewed due to the comments presented above.

In addition, this proposal cannot be achieved without the Housing Assistance Plan being amended. Said HAP is scheduled for amendment if the U.R. Project is to be developed and amending it for this proposal could adversely affect the feasibility and timing of the plans to develop the U.R. Project. Therefore, I cannot recommendan [sic] affirmative approval to this proposal as it stands now.

Attached is a letter received for Suffolk County relative to this project. Since the answer to HUD should be consistant [sic] with the County, request is hereby made to answer this letter directly.

The "U.R. Project" referred to in Dunne's memorandum is an urban renewal project. The attached letter referred to in the final paragraph of the memorandum was dated September 12, 1980, and was addressed to Suffolk County Executive Peter F. Cohalan by HUD's Area Manager, Alan H. Wiener.

Plaintiff Huntington Branch, NAACP, is a branch of the NAACP, a national organization with over 1700 branches. Huntington Branch, NAACP is governed by the constitution, by-laws, and policies of the national office.

On May 27, 1980, the Town Board adopted a resolution directing the Planning Board to conduct a study of housing needs of "resident senior citizens and the youth of the Township." On August 26, 1980, when only preliminary data from the 1980 census was available, the Town Board adopted a resolution extending the time for the Planning Board to complete its housing study, to January 1, 1981, or a reasonable time thereafter.

Housing deterioration in Huntington is disproportionately in the areas of minority concentration and particularly in and around the Huntington Station area and surrounding the former urban renewal area. Gateway Gardens was established in Huntington Station by action of the Town Board, and was the first public housing project in Suffolk County.

The Town of Huntington executed cooperation agreements or amendments thereto with the Town of Huntington Housing authority (HHA) on December 3, 1960, November 27, 1963, June 2, 1977, and September 14, 1984. On September 14, 1984, the Town Board Authorized execution of a cooperation agreement with HHA relative to HHA's application for seventy-five units of public housing under the conventional construction program, and such an agreement was executed by the Supervisor promptly thereafter.

A 150-unit section 8-assisted low income project proposed in 1980 and 1981 for Huntington Station was to be located in the Huntington Union Free School District. The Huntington NAACP opposed the proposed project. The Huntington Union Free School District was under a 1972 desegregation order of the New York Commissioner of Education, which required it to submit a plan for school attendance zones that would achieve racial integration in each of the elementary schools of the district commencing in the 1973-74 school year, and thereafter. The Commissioner provided additional time "to allow the full effect of the urban renewal project currently under construction in Huntington Station to be known and to be taken into ac-

count." The Commissioner retained jurisdiction of the matter to assure further compliance.

Plaintiff Kenneth L. Cofield is black and has a wife and four children. When he first moved to Huntington, he obtained housing for himself, his wife, and two children in Whitman Village. During the time he lived in Whitman Village, Cofield was employed by the Town of Huntington Sanitation Department. He later lost his job because of lateness; he and his family then moved in with his mother-in-law on Academy Place and paid no rent. Later, Cofield's wife and children moved into a private residence at 56 Sixth Street in Huntington Station, for which Kenneth Cofield did not pay any part of the rent. After the landlord at 56 Sixth Street sold the residence, Mrs. Cofield and her children moved back to her mother's house, while Kenneth Cofield stayed with his mother in Glen Cove. Later, Kenneth Cofield moved into a house on Ontario Street with his wife and children. The realtor, Pius Realty, advised him that it was possible for him to get a section 8 certificate, which he did obtain. In March 1984, he was paying $229 per month in rent for the Ontario Street residence; and the government subsidy was approximately $468 per month.

From approximately 1971 or 1972 until 1979, plaintiff Perrepper Crutchfield lived at 13 Nixon Court in Homestead Village, Coram, New York. The apartment was a HUD-funded three-bedroom duplex for which she paid $295 per month in rent. From approximately December 1979 until December 1982, except for two or three months, Crutchfield resided at 65 Carr Lane in Coram, which, at the time, was a private residence owned by her parents. Crutchfield paid her mother $300 per month in rent. Crutchfield was a trainee and later an employee of the State University of New York at Stony Brook as a medical technician for approximately ten years. When she left Stony Brook, she was earning $12,500 per year. In 1978, Crutchfield began employment as a medical technician at the Northport Veterans Administration Hospital at a starting salary of $9,000 per year. As of October 1983, she remained employed at the Northport VA and was earning a salary of $17,500 per year. In December 1982, Crutchfield moved into Apartment 106 at Lincoln Manor. As of October 1983, she lived there with her two

daughters, one of whom was twenty-five years of age. As of October 1983, Crutchfield was paying $351 per month in rent for a two-room apartment. The apartment is very well kept and very clean. Crutchfield would prefer a three-bedroom apartment. As of October 1983, Crutchfield did not pay for garbage pick-up or water; she paid an electric bill of approximately $50 to $60 every two months.

The Town of Huntington has participated in the federal Housing and Community Development Program since its inception in 1975, and has received CDBGs from HUD on an annual basis. A HAP is a document that must be submitted to HUD by a community applicant in conjunction with a request for CDBG funds, which are used for community development activities and may not themselves be used to build low income housing or to provide rent subsidies for newly constructed low income housing. When a community applies for CDBG funds, it must submit a three-year HAP specifying the community's housing needs and conditions and setting goals for the provision of housing assistance in the community during the three-year period covered by the HAP. The HAP must include goals for the number and types of units to receive HUD assistance. If a community does not submit to HUD a satisfactory three-year HAP, its CDBG application cannot be approved. Among the goals with respect to numbers and types of units that a community must set forth in its HAP are the goals for the creation of housing units through HUD's Substantial Rehabilitation and New Construction Programs.

Huntington was approved for CDBG funds for the program year beginning July 16, 1978 in the amount of $1,591,000. An attachment to the official approval letter submitted to Huntington in connection with this grant stated: "This Office has serious concern with respect to provision of family renter units. In this regard, please see Item No. 20 of HUD Form 7082 for Special Contract Condition." The special condition imposed on this grant read as follows:

> Notwithstanding any other provision of the Grant Agreement, the applicant by July 30th, 1978 shall provide evidence satisfactory to the Department that positive and affirmative steps have been taken to insure implementa-

tion of the 100 units of Section 8 Substantial Rehabilitation for families contained in the FY '78 Housing Assistance Plan. Such evidence shall be no less than specific indications of meetings and consultations with developers, community groups, public bodies and all others necessary to enable the Town to proceed expeditiously with the development of these units. A specific timetable detailing how these units are to be developed shall be furnished this Office.

Failure to comply with this condition shall constitute cause for reduction of your Grant pursuant to applicable regulations including Section 570.913.

Huntington was approved for CDBG funds for the program year beginning July 16, 1980 in the amount of $1,814,000. An attachment to the official approval letter submitted to Huntington states: "Please be advised that this Office expects that you will take all positive and affirmative steps to implement housing proposals as may be submitted during the Program Year."

Huntington was approved for CDBG funds for the program year beginning July 16, 1981 in the amount of $1,743,000. An attachment to the official approval letter submitted to the Town states:

1. Your approved Housing Assistance Plan, does not make provision for new construction or substantial rehabilitation. While this may be realistic in view of the current and short term projected availability of funding for new construction and substantial rehabilitation, this Office nevertheless remains concerned about the provision of newly created assisted housing units in the Town of Huntington. Accordingly, in the event that financial resources were to become available during the Program Year, the Town is required to take all actions within its control to provide for the construction of 100 newly created units of new or substantially rehabilitated rental housing by household type consistent with and proportional to your established needs.

In order to meet this requirement, the Town shall submit to HUD an amended Housing Assistance Plan to accomodate [sic] such development reflecting provision of these units on a site or sites acceptable to HUD. Said Housing Assistance Plan shall be submitted within 60 days of receiving notice from HUD that such funding resources are available.

Failure to comply with this requirement may be cause for this Office to consider any and all actions available under the provisions of 24 C.F.R. 570.910 through 570.911.

Huntington was approved for CDBG funds for the program year beginning July 16, 1982 in the amount of $1,436,000. An attachment to the official approval letter states:

1. By letter dated 6/15/82 this Office has acknowledged your request of 6/3/82 to extend your Housing Assistance Plan (HAP) through 9/30/82 without change. In this regard please be advised that comments relating to said Housing Assistance Plan contained in our approval of your FY 1981 grant, under cover of 7/15/81, continue to remain fully applicable.

Huntington was approved for CDBG funds for the program year beginning July 16, 1984 in the amount of $1,342,000. An attachment to the official approval letter states:

1. The past performance of the Town in the provision of newly created assisted rental housing for families has been a major concern of the Department for several years. This concern resulted in the delay of the New York Office's approval of the Town's three-year and second-year annual Housing Assistance Plan (HAP) until the HAP provided for at least 75 family public housing units of new construction or acquisition with rehabilitation in non-minority impacted areas of the Town. These units are to be developed under the Public Housing or Section 8 Programs. The HAP was approved by HUD on April 17, 1984.

On July 13, 1984, the New York Office of HUD invited the Huntington Housing Authority to submit an application for the development of public housing projects for families. On July 17, 1984, this Office received an application from the Housing Authority for 75 family units under the Public Housing Program. The application package did not include the Cooperation Agreement or the certified copy of the Transcript of Proceedings containing the local Governing Body Resolution approving the Application for a Preliminary Loan. In addition, the documents submitted did not include the justification for new construction mentioned in the application.

The Town is required to cooperate with and provide assistance to the Housing Authority to insure the submission of these documents by September 14, 1984. Failure of the Town to act affirmatively in connection with these submissions would be cause for this Department to take action on the Town's FY '84 CDBG Award pursuant to 24 CFR Section 570.911.

Huntington set forth low cost housing needs in the Town in the HAPs it submitted to HUD for the period of 1976 through 1978. Huntington set the owner household need at 800 units, of which 250 was a need of the elderly, 157 a need of small families and 393 a need of large families. Total renter household needs was set at 2217, of which the elderly need was 543 units, the small family need 1028 units and the large family need 646 units. A separate low cost housing need was set for persons expected to reside in Huntington. This need totaled 430 units, of which 112 was for elderly, 168 for small families, and 150 for large families.

Huntington's HAP for the period 1976-78 set goals for provision of lower cost housing through a variety of HUD programs. This HAP set a goal for 400 new units under the section 8 new construction program with 292 of the units for elderly and 108 of the units for families. A goal of 50 units was set to be obtained through the Section 8 substantial rehabilitation program, all of the units to be for families. A goal of 100 units was set for

other rehabilitation to create renter units under the section 312 programs,[2] with all of the units slated for families. A 200-unit goal was set through use of loans and grants from the community development funds and banks, with all of the units slated for families. A goal of 50 units was set by use of the existing section 8 program with 15 of the units for the elderly and 35 for families. Another 100-unit goal was set to be accomplished through rehabilitation assistance to homeowners or prospective homeowners with loans and grant from community development funds. All of these units were to be for families. Finally, a goal of 50 units was set to be met by other rehabilitation to homeowners under the section 312 program, with all the units slated for families.

The Town's revised HAP for the period 1979-82 set an assistance need for owner households totaling 666 units, of which 271 were for elderly households, 278 for small family households, and 117 for large family households. This HAP also set a total assistance need for renter households at 2793 units, of which 739 were for elderly households, 1627 for small family households, and 427 for large family households.

The 1979-82 HAP set a goal to meet the needs of lower income homeowners through rehabilitation assistance for 150 units under the HUD CDBG and section 312 programs, with 62 of these units for the elderly and handicapped and 88 for families. The needs of lower income renters were responded to by the setting of a goal for providing assistance for prospective homeowners through use of an "innovative" program for 20 family units and the use of an FHA/acquisition/resale program for 30 family units. The HAP also called for establishing new rental family units through another "innovative" program. The HAP also set a goal of rehabilitation of 250 rental units, 53 for elderly and handicapped persons and 197 for families. With respect to the goal for rehabilitation, the HAP stated that 50 units (three elderly and handicapped and 47 family) would be assisted through CDBG funds, 100 units (25 elderly and handicapped and 75 family) would be provided through the section 8

2 The section 312 program for housing rehabilitation loans is set forth in 42 U.S.C. § 1452b, as amended.

substantial rehabilitation programs, and 100 units (25 elderly and handicapped and 75 family) would be provided through section 8 existing and moderate rehabilitation programs. Finally, this HAP set a goal of assisting low income renters by securing 125 existing section 8 certificates, 25 for the elderly and handicapped and 100 for families.

Huntington's HAP for 1982 states that the rental subsidy needs of lower income households in the Town totals 3692 units, of which 930 (25.8%) is an elderly need, 2472 (66.9%) is a small family need, and 290 (7.9%) is a large family need.

Among the goals for meeting the needs set forth in the Town's 1982-85 HAP is a goal for 75 new or rehabilitated housing units for families to be provided under the Public Housing or section 8 programs.

Huntington Housing Authority figures for Gateway Gardens, located at the southwest corner of New York and Lowndes Avenues, showed that as of January 10, 1984, of the 30 family units in the project, 26 were occupied by black families and four by Hispanic families. With respect to the ten units for elderly persons, eight were occupied by blacks and two by whites.

Prior to January 10, 1984, the waiting list for Gateway Gardens was closed. It was reopened for one-bedroom units briefly in the spring of 1984, and then closed again. As of January 10, 1984, according to Housing Authority figures, there were 111 names of the waiting list, divided as follows:

Unit Type	White	Blacks	Hispanics
Senior citizen	17	10	5
Family 2 bedroom	6	19	12
Family 3 bedroom	5	19	12
Family 4 bedroom	1	4	1
Totals	29	52	30
Totals (families only)	12	42	25

Lincoln Manor was occupied in July 1980. The project is privately owned and managed by the Huntington Housing Authority, which is responsible for rentals. The project is located at the southwest corner of Ninth Street and First Avenue.

Housing Authority figures for Lincoln Manor as of January 10, 1984 showed that eight of the 30 units were occupied by handicapped persons. The remaining 22 units were occupied by families. The elderly and handicapped are eligible to occupy family units, but families are not eligible to occupy elderly or handicapped units. Overall, 21 of the units were occupied by white persons, six by blacks, and three by Hispanics.

Housing Authority figures as of January 10, 1984 showed that a total of 102 persons were on the waiting list for units at Lincoln Manor. The waiting list was closed on that date. The list divided as follows:

Unit Type	Whites	Blacks	Hispanics
1 bedroom	34	14	5
2 bedroom	21	9	2
3 bedroom	1	10	6
Totals	56	33	13

Paumanack Village is located on the south side of Pulaski Road, east of Naples Lane.

Housing Authority figures as of January 1984 showed that 22 rehabilitated units were rented to lower income families in Huntington. On the same date, the Housing Authority had reported racial statistics on the occupancy of 21 units. These statistics showed that nine of the units were occupied by black families, nine by Hispanics families, and three by white families.

The Housing Authority participates in the HUD existing section 8 program. Under this program, qualifying persons may obtain an existing section 8 certificate from the Housing Authority. With the certificate, the person or family must locate a rental housing unit in Huntington. Rent for the unit must not exceed limits prescribed by HUD. HUD will then subsidize the rental on the unit so that the person or family pays no more than 30% of income for housing costs.

In January 1984, the Housing Authority had available to it 235 existing section 8 certificates. Housing Authority figures for the existing section 8 program as of January 10, 1984 showed that 219 units in Huntington were occupied by persons

or families holding existing section 8 certificates. Of this number, 162 holders of certificates were families, and 59 were elderly or handicapped. Of the family certificate holders, 52 families were white, 88 were black, and 22 were Hispanic. Of the elderly and Hispanic, 47 were white, nine were black, and one was Hispanic.

The Housing Authority's waiting list for existing section 8 certificates in January 1984 divided as follows:

Housing Type	Whites	Blacks	Hispanics
1 bedroom	58	24	7
2 bedroom	40	68	24
3 bedroom	26	34	19
4 bedroom	0	21	3
Totals	124	147	53
Percentage	39	45	16

Sometime in 1978, the Huntington Community Development Agency, then under the directorship of Michael Miness, proposed to Town officials that an abandoned elementary school (Lincoln School) located at 9th Street and 1st Avenue be converted with new HUD section 8 substantial rehabilitation funds into lower cost housing. The Lincoln School had been used by the Huntington School District until 1971. For a period during the 1970s, the building had been purchased and occupied by the Association for the Help of Retarded Children. That organization was the fee title owner of the property at the time of the rezoning. In 1978, the building was vacant and deteriorating. The Community Development Agency's proposal called for the development of this project by a private developer.

In order to proceed with this section 8 substantial rehabilitation program at the Lincoln School site, it was necessary that the developer of the project obtain multi-family residential zoning for the property. At the time, the site was zoned in the R-5 zoning classification, which permits two-family dwellings as well as single-family dwellings.

The Community Development Agency's proposal with respect to the Lincoln School site envisioned a development

maintained and operated—but not owned—by the Housing Authority.

On August 22, 1978, Ronald Glickman, then the Town Attorney, wrote a letter to Miness responding to a "recent inquiry" concerning rezoning of the Lincoln School site to the R-3M garden apartment special district zoning category. Glickman stated that in his opinion if the Town Board were to grant a zone change to R-3M for the Lincoln School site, such zone revision would meet the qualifications and requirements of R-3M zoning. Glickman stated: "[T]he fact that the R-3M zoning category makes reference to an 'urban renewal plan' should not present difficulties herein since the Community Development program has superseded the older urban renewal designations. Thus, so long as the subject premises is within the community development areas, it meets the requirements of Section 62-4.8 of the Town Code."

On June 26, 1979, the Town Board adopted a resolution amending the Town zoning map to provide for an R-3M zoning classification for the Lincoln School site. Enactment of this change was conditioned upon there being a maximum of 30 housing units on the parcel. The zone change had been requested by Daniel Regan Associates, the organization/builder selected to develop the project. The Lincoln Manor management plan prepared by Daniel Regan Associates set forth certain priorities and occupancy goals with respect to decisions on tenant selection. One of the priority and occupancy goals provided in the plan reads, "Racial and ethnic diversity generally to reflect the composition of the community, which is 95% white and 5% black and hispanic." The Huntington Housing Authority was retained by Daniel Regan Associates to manage the Lincoln Manor project.

Pursuant to HUD regulations, a local community may use what is known as a "pre-approved site" procedure to receive priority consideration for a particular site for section 8 new construction funding. Under the procedure, the community may submit a proposed housing site to HUD for evaluation before developing a specific proposal for the housing to be built on that site. If HUD grants pre-approval for the application, it may reserve the funds for that site in the amount of the subsidy

necessary to support the proposed number of units to be built on the site. This procedure ensures that funding for the ultimate proposal for housing will be available. Projects and sites granted pre-approval under this special procedure are not required to compete for available section 8 funding in the normal course of grant requests pursuant to HUD NOFAs.

On April 18, 1980, Harold T. Letson, Huntington's Director of Planning, wrote a memorandum to Charles Offerman, Acting Director of the Huntington Community Development Agency, discussing the "probable impacts" of development of the New York Avenue site with low rent section 8 housing units. The memorandum considered the possible impact on the Huntington School District No. 3 with respect to increased minority enrollment resulting from construction of the project. According to Letson, "[m]inority group attendance would increase from 381 children to 413 children, and the ratio would increase from 17.6% of enrollment to 18.1% of enrollment." Letson concluded that there were positive advantages attending construction of the proposed project for both the majority and minority groups that "would tend to outweight [sic] the aspect of expanded minority group concentration in the school district, which, in any event, appears miniscule [sic]."

Pursuant to a letter from Alan Weiner to Kenneth Butterfield, dated July 10, 1980, HUD granted pre-approval for the proposed section 8 development in the Urban Renewal Area for 150 units of family housing and set aside $1,012,140 in section 8 subsidies for that purpose. Approval was granted subject to the Town, *inter alia*, amending its HAP to provide a goal for new construction. *See supra* p. 766.

In a memorandum dated July 21, 1980, Butterfield advised all councilmen of the HUD pre-approval for the Huntington Station project and scheduled a meeting of the Town Board for July 24, the meeting to be attended by Town legal counsel. Butterfield ended his memorandum with the statement: "Once again, I feel it's incumbent to caution you about disclosing the contents of this memo and the attachment [HUD's pre-approval letter] until we have obtained the counsel's recommendations."

In a memorandum dated October 23, 1980, Butterfield advised all councilmen about developments with respect to the Huntington Station project. He stated in part:

> HUD has set a deadline of December 1st to hear from the developer about the proposal. I do not know what their deadline would be concerning their posture on future federal funding of our Community Development Agency, but I assume it is closely connected.
>
> Accordingly, I would like to hear from you either in the affirmative or in the negative as to whether the east side of urban renewal be developed [sic] with section 8 funding. Please keep in mind the caveat in my memo of July 21st. We cannot bury our heads in the sand as to future funding for community development projects, nor can we ignore the vulnerability of our housing plan which may be subjected to litigation if we are not earnestly attempting to alleviate some of the housing needs in our Town. We can expect resistance to any project we propose, but the force and effectiveness of that opposition can only be defused by a predetermined attitude on the part of the Board to proceed with the project. In other words, if we are all in favor of it, the opposition will lose steam.

In a letter dated December 11, 1980, Weiner advised Butterfield that the pre-approval letter of July 7, 1980 for the Huntington Station site required Huntington to establish a schedule leading to the submission of a preliminary proposal by a qualified developer. Weiner advised that no response to that request for a schedule had been received and that HUD could not hold funding commitments available for projects where there has been no evidence of acceptable progress. Weiner also requested that a schedule for undertaking various required actions be submitted to HUD by January 15, 1981.

In a memorandum from Butterfield to the other councilmen dated December 11, 1980, Butterfield reviewed the status of the Huntington Station project. He stated in part:

> I must, therefore, reiterate that I support the development of the northeast corner of Broadway and Route 110 by uti-

lizing Section 8 funding of thirty units for senior citizens and 120 units for families. Housing Help's proposal to HUD is pending and one of the major considerations that HUD will be faced with is, are we moving ahead with housing? If the answer is, yes, then Housing Help's ill-conceived proposal will not be seriously considered and the continuation of our community development funds will be secured. If the answer is, no, then the courts will be the arena where planning and zoning is [sic] determined. That would be irresponsible on the part of the Board.

• • • • •

I further implore you to respond to me immediately in writing so that we can contact HUD in an effort to maintain the allocation of funding which could easily be diverted to another community. I don't know how many memos I need to write, but I refer you to my memos of October 23rd and October 29th. Let's get on with it!

On January 13, 1981, the Huntington Town Board passed two resolutions relating to the Huntington Station project. The purpose of these resolutions was to confirm the Town's commitment to the project and to request that HUD maintain its pre-approval of the site. One of the resolutions states that the Town Board "emphatically supports the development of these parcels with Section 8 Assisted Housing for moderate or middle income families." Both resolutions referred to the project as proposed for 150 units, of which 120 were to be for families and 30 for the elderly. Both resolutions were adopted by a 4 to 1 vote.

In February 1981, the Town selected Related Housing Companies to be developer for the Huntington Station project.

By a letter dated February 17, 1981, Butterfield replied to Weiner's letter of January 27, 1981, which commented on the January 13 resolutions. Butterfield, in explaining the Town revision of the unit type projection from 150 family units to 120 family units and 30 elderly units, stated the Town had from the outset intended that the one bedroom units in the project would be for the elderly. Butterfield also stated that the three-year

HAP goal would be amended and, "unless directed otherwise, will include the 150 units of new construction, specifically identifying 30 units for Senior Citizens."

On February 23, 1981, plaintiffs filed this action, challenging, among other things, HUD's pre-approval of the Huntington Station site.

In 1980, blacks comprised 3.35% of the Town's population.

The Town's first zoning ordinance was adopted on June 26, 1931. On December 5, 1934, the Town Board adopted a completely redrafted ordinance that was amended from time to time until a new zoning code was adopted by the Town Board on June 3, 1969. In 1956, multiple residential dwellings were eliminated as permitted uses in all but the general and special business districts and in those districts where two-family dwellings were permitted. On November 22, 1960, two-family dwellings were deleted from the Code but two-family dwellings were still permitted in Residence E and Special Business Districts (today known as R-5 and C-3 Districts, respectively). On March 4, 1964, the Town Board created a public housing district that, in addition to its other provisions relating to multiple dwellings, permitted two-family dwellings. The land upon which Gateway Gardens is situated was placed in the new zone. On June 3, 1969, the R-3M Residence District was created. In addition to its other provisions relating to multiple family dwellings, it permitted two-family dwellings. Also on June 3, 1969, the C-1 Office Residence District was added, and also permitted two-family dwellings.

The R-3M district was adopted on June 3, 1969 and provided for multiple dwelling uses in urban renewal areas, or for projects to be owned and managed by the Huntington Housing Authority, inside or outside of an urban renewal area. The Public Housing District was merged with, and became a part of, the R-3M residence district in 1969. Only three developments—Gateway Gardens, Whitman Village, and Lincoln Manor—have been built in Huntington pursuant to R-3M zoning.

There is only one vacant parcel of land in Huntington currently zoned R-3M. The parcel at the northeast corner of Broadway and New York Avenue is partially zoned C-6 and partially zoned R-3M. This is the same parcel upon which the

Town requested pre-approval for its section 8 housing development for a 150-unit project, pursuant to a letter from Butterfield to HUD on June 2, 1980. The R-3M section of this parcel approximately six acres.

The R-RM Retirement Community District set forth in the Town Zoning Code permits multiple residential developments for aged persons. Only one development—Paumanack Village—has been built in Huntington pursuant to R-RM zoning. Other than the parcel involved with Paumanack Village, there is no vacant R-RM-zoned land in Huntington.

Under section 281 of the New York Town Law, a developer may be given approval to cluster units into a multi-family context with the total number of units not to exceed that number of units that could be built under the existing zoning provisions. These section 281 developments all involve parcels where the underlying zoning provides for single-family or two-family detached housing.

II. *Legal Framework*

The central issue in this case is whether defendants violated title VIII and the New York Town Law by restricting private construction of multi-family housing units to an urban renewal area and by refusing to provide multi-family zoning for the Matinecock Court project proposed by HHI for a 14.6-acre site at the corner of Elwood and Pulaski Avenues. The parties disagree over the standard of proof on the title VIII claim.

According to plaintiffs, although the Supreme Court has required proof of discriminatory *intent* on equal protection claims, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049, 498 L.Ed.2d 597 (1976); *accord, e.g., Coalition of Bedford-Stuyvesant Block Association, Inc. v. Cuomo*, 651 F.Supp. 1202, 1209 (E.D.N.Y.1987), the weight of authority holds that proof of a discriminatory *effect* alone would establish a *prima facie* case under title VIII. For their part, defendants argue that the Second Circuit's decision in *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir.1979),

implicitly adopted the disparate treatment analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), where the Court held that a prima facie case of racial discrimination would be made out in a title VII action if the plaintiff could show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. [Footnote omitted.]

In the *McDonnell Douglas* formula, "if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' " *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824). Finally, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* (citing *McDonnell Douglas*, 411 U.S. at 804, 93 S.Ct. at 1825).

At the second stage of the *McDonnell Douglas* process, when the defendant must articulate a legitimate, nondiscriminatory reason for its conduct, the defendant merely has a burden of production, not the burden of persuasion. *Id.* at 254-55, 101 S.Ct. at 1094. The ultimate burden of persuasion is with the plaintiff at all times. *Id.* at 253, 256, 101 S.Ct. at 1093, 1095.

Against this background, the court turns to *Robinson v. 12 Lofts Realty, Inc., supra*. Robinson sued the owner of a cooperative apartment building and one of its shareholders, under title VIII and 42 U.S.C. §§ 1981 and 1982, after the shareholders rejected him as a prospective purchaser. Discussing the standard for a *prima facie* case under title VIII, the court observed:

> The courts that have dealt with this question have concluded that in order to prove a prima facie case of race dis-

> crimination plaintiffs needed to show only that the action complained of had a racially discriminatory effect; they were not required to show that the defendants acted with racially discriminatory motivation.

610 F.2d at 1036. The first case cited by the Second Circuit for this proposition was *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir.1977) (*Arlington Heights II*), *cert. denied*, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978). In *Arlington Heights II*, the Seventh Circuit had before it a question left open by the Supreme Court's decision that an equal protection claimant must prove discriminatory motive: what is the standard of proof for a title VIII claim? "[T]he Seventh Circuit, along with most other circuits, has held that discriminatory impact is the appropriate standard by which to determine whether a plaintiff has made out a prima facie case under § 3604(a)." *Robinson*, 610 F.2d at 1037 (footnote omitted). (The statute mentioned, 42 U.S.C. § 3604(a), prohibits refusals to sell or rent a dwelling on the basis of race, color, religion, sex, or national origin.)

Analogizing to *McDonnell Douglas, Robinson* held that

> a plaintiff who claims that he as an individual has been the victim of a discriminatory denial of housing[ ] may establish his prima facie case by proving the following facts:
>
> (1) that he is Black;
>
> (2) that he applied for and was qualified to rent or purchase the housing;
>
> (3) that he was rejected; and
>
> (4) that the housing opportunity remained available.

Id. at 1038 (citing *McDonnell Douglas, supra*, 411 U.S. at 802, 93 S.Ct. at 1824).

Consistent with its application of the *McDonnell Douglas* formula, the Second Circuit added that, once the plaintiff makes out a *prima facie* case, the defendant must come forward with evidence to show its actions were not racially motivated, *id.* at 1039; thereafter, plaintiff would have an opportunity to show that defendant's stated reason was pretextual, *id.* at 1040 n. 13. The court concluded with an admonition that discrimina-

tory intent is often hidden, so "when a discriminatory effect is present, the courts must be alert to recognize means that are subtle and explanations that are synthetic." *Id.* at 1043.

On the surface, then, it would appear that the familiar standards of a title VII case would apply to this title VIII action. If so, assuming plaintiffs could make out a *prima facie* case, defendants would be required to do no more than articulate a legitimate, nondiscriminatory justification for their actions, and plaintiffs would be required to show that the justification was a pretext. As stated in *Burdine, supra,* 450 U.S. at 253, 101 S.Ct. at 1093, plaintiffs would have the ultimate burden of persuasion at all times.

Plaintiffs do not believe that this is the law. They point to the following language from a recent opinion of the Fourth Circuit:

> The burden confronting defendants faced with a *prima facie* showing of discriminatory impact is different and more difficult than what they face when confronted with a showing of discriminatory intent. Defendants may overcome a *prima facie* showing of discriminatory intent by articulating some "legitimate non-discriminatory reason for the challenged practice." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). However, when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice. *Williams v. Colorado Springs School District #11*, 641 F.2d 835, 842 (10 Cir.1981); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

Betsey v. Turtle Creek Associates, 736 F.2d 983, 988 (4th Cir. 1984) (footnote omitted); *accord Davis v. Richmond, Fredericksburg & Potomac Railroad*, 803 F.2d 1322, 1328 (4th Cir. 1986) (defendant's burden in disparate impact case is heavy; once discriminatory impact is shown, defendants must prove compelling necessity to justify it).

What is more, to the extent that the Second Circuit has sent out conflicting signals for title VIII cases, plaintiffs seek harmony in a footnote in *Robinson*. Specifically, a divided panel

of the Second Circuit had held that there was no violation of title VIII where a private landlord had imposed minimum income standards for prospective renters. *Boyd v. Lefrak Organization*, 509 F.2d 1110 (2d Cir.), *cert. denied*, 423 U.S. 896, 96 S.Ct. 199, 46 L.Ed.2d 129 (1975). The salient portion of *Boyd* was the court's discussion of the racial impact of the landlord's rule:

> While blacks and Puerto Ricans do not have the same access to Lefrak apartments as to whites, the reason for this inequality is not racial discrimination but rather the disparity in economic level among these groups. While a showing of a disproportionate effect on non-whites is sufficient to require application of the compelling state interest standard in the context of an equal protection challenge to government action, such an analysis is inappropriate in the context of a purely private action asserting a claim of racial discrimination. A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in the poorer economic groups. The fact that differentiation in eligibility rates for defendants' apartments is correlated with race proves merely that minorities tend to be poorer than is the general population. In order to utilize this correlation to establish a violation of the Fair Housing Act on the part of a private landlord, plaintiffs would have to show that there existed some demonstrable prejudicial treatment of minorities over and above that which is the inevitable result of disparity in income. Just as this court will not impose even on the government an affirmative duty to construct low-income housing when the decision not to build is not racially motivated, so we will not impose an affirmative duty on the private landlord to accept low income tenants absent evidence that his motivation is racial rather than economic in origin.

Id. at 1113 (citations omitted).

The *Robinson* panel observed that the Seventh Circuit, in *Arlington II*, *supra*, and most other circuits agreed "that discriminatory impact is the appropriate standard by which to determine whether a plaintiff has made out a prima facie case under § 3604(a)." *Robinson*, *supra*, 610 F.2d at 1037. A footnote on the quoted language maintained that *Boyd* was not inconsistent with this rule. After comparing the views of the *Boyd* majority and dissent, the footnote stated:

> [T]hese conclusions were drawn after a full trial of the case, in which the defendant had come forward with evidence as to why the criterion it adopted was used and why it was relevant to its decisions whether to rent the premises. The conclusion after a full trial that the plaintiffs have failed to show racial motivation does not imply that proof of motivation was required in order for the plaintiffs to establish a prima facie case.

Id. at 1038 n. 10.

Whether or not the *Robinson* footnote provides an intellectually satisfying explanation of *Boyd*, the footnote is, at this writing, the Second Circuit's last word on the subject. As such, it binds this court. Moreover, *Boyd* is distinguishable from this case, arguably, because it involved a private landlord's rental decisions, while this case involves a municipality's zoning practices. On the other hand, *Robinson's* adoption of an "effects test," *id.* at 1036-38, might be dictum, because the case involved discrimination against an individual, rather than, as here, a class. *Angell v. Town of Manchester*, E.O.H. (P-H) ¶ 15,398, 15,998.245, 15,998.273 (D.Conn. Oct. 14, 1981). *Angell*, nevertheless, followed *Robinson's* suggestion and held "that a prima facie violation of Title VIII may be established by proof that the defendants' acts had a racially discriminatory effect, that is, that the acts have a greater adverse impact on one racial group than another or that the acts have a segregative effect on the community." *Id.* at 15,998.274. Evidently dubious about *Robinson's* attempt to harmonize *Boyd*, *Angell* avoided reliance on the older case by noting that it had been decided before *Arlington II* (and, of course, before *Robinson* had endorsed *Arlington II*) and that it had assumed the applicability of an intent standard without explaining why. *Id.* n. 75.

Further complicating matters is a limitation within *McDonnell Douglas*: "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. "In a class action, on the other hand, proof that each individual class member is a victim of discrimination is not a necessary component of a *prima facie* case of a pattern and practice of discrimination." *Thompson v. Sawyer*, 678 F.2d 257, 284 (D.C.Cir. 1982).

While the Second Circuit has equivocated on the appropriate standard of proof in a title VIII case, the other circuits have not been quite unanimous, either. Two useful *vade mecums* are *Brown v. Artery Organization, Inc.*, 654 F.Supp. 1106 (D.D.C. 1987) (Greene, J.), and *Keith v. Volpe*, 618 F.Supp. 1132 (C.D. Cal.1985) (Pregerson, Cir. J., sitting by designation). *Brown* took note that

> [s]ome of the decisions hold, or at least intimate, that evidence of discriminatory effect is alone sufficient to establish a *prima facie* case under the [Fair Housing] Act. Other decisions—sometimes the same decisions—suggest that effect by itself is never enough; that there must also be a showing that the private landowner intended to discriminate. *See generally Betsey, supra*; *Arlington II, supra*.

Brown, *supra*, 654 F.Supp. at 1114.

The court added that the cases had distinguished between "adverse impact discrimination," i.e., a practice that hurts minorities within the group to which the practice is applied, and "ultimate effect discrimination," i.e., a practice that hurts the entire population of a community. *Id.* at 1115. Continuing his analysis, Judge Greene stated:

> Moreover, in some of the cases involving allegations of ultimate effect discrimination, liability under the Fair Housing Act appears to depend upon whether the defendant is a governmental body or a private entity, suggesting that proof of discriminatory effect alone (without proof of discriminatory intent) is enough only when the defendant is a governmental body. Indeed, the "ultimate effect" decisions generally involve governmental defendants, *see, e.g., [Resident Advisory Board v.] Rizzo*, 564 F.2d [126,] . . . 149 [(3d Cir.1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978)]; [*United States v. City of*] *Black Jack*, [*Missouri*,] 508 F.2d [1179,] . . . 1184-85 [(8th Cir.1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975)], and some of them explicitly hold that an action against a private landlord cannot be premised upon allegations of ultimate effect discrimination. *See, e.g., Boyd v. Lefrak Organization*, 509 F.2d 1110 (2d Cir.1975); *Dreher v. Rana Management, Inc.*, 493 F.Supp. 930 (E.D.N.Y.1980).

Id.

Judge Greene was writing on a *tabula rasa* in the District of Columbia Circuit. He formulated a series of rules, the first of which is relevant to the case at bar.

> If the defendant is a governmental body, proof of discriminatory impact of its actions on the community for which it serves suffices to establish a *prima facie* case of violation of the Fair Housing Act. It is unclear from the decided cases whether the governmental body involved can overcome that *prima facie* case by proof of a neutral or positive purpose or whether, in view of the objectives of the Fair Housing Act, the perpetuation of racial segregation or other discrimination by government must be regarded as so pernicious that evidence of a benign intent will not save the activity. Since, in the present posture at least, this case does not present that issue, its resolution may properly be left to another day or another court.

Id. (footnote omitted).

In *Keith v. Volpe*, *supra*, Judge Pregerson described the areas of agreement and disagreement among the circuits.

> The circuits that have addressed the issue have agreed that the phrase "because of race" [in 42 U.S.C. § 3604(a)] does not require proof of discriminatory intent; rather, proof of discriminatory effect may be sufficient to demonstrate a violation of the Fair Housing Act.

Once the plaintiff has established a prima facie case by demonstrating racially discriminatory effect, the burden shifts to the defendant to demonstrate that non-discriminatory reasons justify its conduct. If the defendant offers no valid non-discriminatory reasons for its actions, then the plaintiff has succeeded in proving a Title VIII violation. If the defendant does offer valid non-discriminatory reasons, the court must determine whether they are substantial enough to justify the racially discriminatory effect.

The circuits have applied different standards, however, in determining how important a discriminatory effect is to proving a prima facie case and in determining whether the defendant's proffered justifications are sufficient to rebut the plaintiff's prima facie case. . . .

The Third and Eighth Circuits seem to take the position that proof of discriminatory effect alone is always sufficient to establish a prima facie Title VIII violation. *Rizzo*, 564 F.2d at 148; *Black Jack*, 508 F.2d at 1184-85. In contrast, the Seventh Circuit has held that proof of discriminatory effect without a showing of discriminatory intent establishes a Title VIII violation only under some circumstances. *Arlington Heights*, 558 F.2d at 1290.

618 F.Supp. at 1147-48 (citations omitted).

Keith cited *Rizzo*, *Black Jack*, and *Arlington Heights II* as indicative of the split among the circuits on the title VIII standard of proof. These are probably the three most frequently cited cases on the subject. The court shall review the discussions in each of the three cases.

In *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir.1974), *cert. denied*, 422 U.S. 1042, 95 S.Ct. 2656, 45 L.Ed.2d 694 (1975), plaintiffs contended that the defendant city had denied persons housing because of race, 42 U.S.C. § 3604(a), and had interfered with the right to equal housing opportunity, *id*, § 3617, 508 F.2d at 1181. The city's conduct giving rise to the action was adoption of a zoning ordinance prohibiting construction of new multiple-family dwellings. *Id.* The city adopted the zoning ordinance after the Inter Religious

Center for Urban Affairs obtained an option on a parcel of land for the purpose of building two-story townhouses for persons of low and moderate incomes. *Id.* at 1182-83. The city had a black population of between 1% and 2%, while the nearby city of St. Louis was 40.9% black. *Id.* at 1183.

The Eighth Circuit held:

> To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because
>
> * * * [w]hatever our law was once, * * we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.

Id. at 1184-85 (citations and footnotes omitted).

Not only did *Black Jack* hold that proof of effect was enough; the court further held that, once a prima facie case is established, the governmental defendant must "demonstrate that its conduct was *necessary to promote a compelling governmental interest*," *id.* at 1185 (emphasis added).

In light of this standard, the court of appeals reversed the district court's judgment in favor of the city, noting that the lower court had failed to take into account the zoning ordinance's "ultimate effect" of keeping 85% of blacks in the metropolitan area from living in Black Jack, at a time when 40% of them were in substandard or overcrowded housing. *Id.* at 1186. The Eighth Circuit also discussed the "historical context" of the zoning ordinance and of the process confining blacks to the inner city while whites lived in surrounding areas. *Id.*

The court rejected the city's proffered justifications—road and traffic control, prevention of school overcrowding, and prevention of devaluation of adjacent homes—because it found

that the zoning ordinance did not further the asserted governmental interests. *Id.* at 1186-87. Accordingly, *Black Jack* did not decide whether the interest behind the ordinance was constitutionally permissible and important enough to outweight the private detriment it caused, nor whether less drastic means were available to reach the stated objective. *Id.* at 1187. It was not necessary to decide whether these elements of the compelling state interest test had been met in view of the court's rejection of the asserted nexus between the ordinance and governmental interests. *Id.*

Arlington Heights II concerned the refusal by the Village of Arlington Heights, Illinois to rezone plaintiffs' property and thus permit construction thereon of federally financed low-cost housing. *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1285 (7th Cir.1977), *cert. denied*, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978). The Seventh Circuit repeated its earlier holding, stated before the case had been remanded by the Supreme Court, that the refusal to rezone had had a discriminatory effect. *Id.* at 1288. The "basic question," the court stated, was "whether the Village's action violated sections 3604(a) or 3617 because it had discriminatory effects when that action was taken without discriminatory intent." *Id.* There were

> two preliminary subissues: first, whether a finding that an action has a discriminatory effect, without a concomitant finding that the action was taken with discriminatory intent, is ever enough to support the conclusion that the action violated section 3604(a); and, if so, under what factual circumstances will it be enough?

Id.

The court cited a series of cases showing that the Fair Housing Act must be interpreted broadly, *id.* at 1289, and concluded that "[c]onduct that has the necessary and foreseeable consequence of perpetuating segregation" violates section 3604(a), 558 F.2d at 1289. It was important to the court's thinking that intent is often difficult to prove, especially because it was no longer fashionable to be overtly bigoted. *Id.* at 1290. Therefore, the Seventh Circuit held that discriminatory effect *can* provide

the basis for a title VIII violation, but declined to create a per se rule. *Id.* Instead, the court listed four factors that ought to be considered:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.

Id.

Arlington Heights II holds that a defendant cannot escape title VIII liability just because whites as well as minorities are affected adversely by the conduct over which suit was brought. *Id.* at 1291. The court noted that *Black Jack, supra*, and *Kennedy Park Homes Association v. City of Lackawanna*, 436 F.2d 108 (2d Cir.1970), *cert. denied*, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 (1971), both found a discriminatory effect in zoning ordinances that prevented construction of low-income housing, even though whites as well as minorities would be deprived of housing. 558 F.2d at 1291. The reason was that the impact remained discriminatory when it perpetuated segregation. *Id.; see Brown, supra*, 654 F.Supp. at 1115.

The Seventh Circuit concluded that the second factor it listed—some evidence of discriminatory intent—was the least important of the four; it would help plaintiffs to show some discriminatory intent, but the hypothesis behind the four-factor analysis is that proof of intent has been too weak to justify relief on that ground alone. 558 F.2d at 1292. Also, the court urged caution in reviewing evidence of intent, because "[t]he bigoted comments of a few citizens, even those with power, should not invalidate action which in fact has a legitimate basis," *id.*

On the third factor—the defendant's interest—*Arlington Heights II* said:

> [I]f the defendant is a governmental body acting outside the scope of its authority or abusing its power, it is not entitled to the deference which courts must pay to legitimate governmental action. On the other hand, if the defendant is a governmental body acting within the ambit of legitimately derived authority, we will less readily find that its action violates the Fair Housing Act.
>
> • • • • • •
>
> [M]unicipalites are traditionally afforded wide discretion in zoning. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974).

558 F.2d at 1293.

On the fourth factor, the court stated that it would be more willing to grant relief when the plaintiff seeks the removal of obstacles to the building of integrated housing than when the plaintiff asks the court to compell the government to take affirmative steps such as appropriating money to build integrated housing. *Id.*

The third case in the trilogy from the courts of appeals is *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3rd Cir.1977), *cert. denied*, 435 U.S. 908, 98 S.Ct. 1457, 55 L.Ed.2d 499 (1978). The court found that the class action plaintiffs had established a prima facie case under section 3604(a) "by proving that the [City of Philadelphia] agencies' acts had a discriminatory effect and that the agencies have failed to justify the discriminatory results of their actions." *Id.* at 146. After observing that the Supreme Court had required proof of intent for equal protection claims, *Rizzo* "conclude[d] that, in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response." *Id.* The court held that section 3604(a)'s use of the term "because of race" did not mean plaintiffs had to prove discriminatory intent. *Id.* at 146-48.

The Third Circuit understood *Arlington Heights II* as reaching a similar result. According to *Rizzo*, the four factors listed by the Seventh Circuit were merely the "standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant." 564 F.2d at 148 n. 32. Judge Pregerson, for one, believes, to the contrary, that the Seventh Circuit's four factors place a wedge between *Arlington Heights II* and the *Rizzo/Black Jack* line of cases. *Keith, supra*, 618 F.Supp. at 1148.

Rizzo explicitly disagreed with *Black Jack* in one particular: whereas *Black Jack* had required defendants against whom a *prima facie* case had been established to justify their actions by showing a "compelling" interest, the Third Circuit thought this too onerous. *Rizzo*, 564 F.2d at 148. The court set the following "rough measures" for a defendant seeking to rebut a *prima facie* case:

> a justification must serve, in theory and practice, a ligitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact.

Id. at 149 (footnote omitted).

Other courts have introduced their own wrinkles. The Sixth Circuit, agreeing with *Arlington Heights II* that the second of that case's four factors was the least important, decided not to consider evidence of discriminatory intent at all. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 575 (6th Cir.1986). The Fifth Circuit holds that a title VIII plaintiff need not show discriminatory intent, so long as he can show "a *significant* discriminatory effect." *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir.1986).

The foregoing review of the case law demonstrates that title VIII jurisprudence remains in flux and that the definitive word has yet to be spoken by the Second Circuit, let alone the Supreme Court. Certain principles, however, do emerge from the cases. It is not necessary for plaintiffs to prove discriminatory intent before they may succeed on a claim under section 3604(a). Although it is not necessary for each plaintiff to prove himself the victim of discrimination, because this is a class action, the three-step analysis of *McDonnell Douglas* remains appropriate; in other words, if plaintiffs prove a *prima facie*

case, defendants must rebut it, and if defendants articulate a legitimate, nondiscriminatory reason for their conduct, plaintiffs must show that the reason is a pretext. Finally, *Robinson* cited *Arlington Heights II* often and approvingly. While much of *Arlington Heights II* did not apply specifically to *Robinson*, because the former was a zoning case and the latter dealt with approval to purchase a cooperative apartment, this is a zoning case. And this court believes that *Arlington Heights II* provides the best framework for analysis of title VIII challenges to zoning ordinances.

By listing four factors for analyzing discriminatory effect, *Arlington Heights II* provides for more flexibility and realism than would a per se rule that discriminatory effect is equivalent to a *prima facie* case. Also, the court finds *Black Jack's* requirement that a defendant rebutting a *prima facie* case need show a compelling interest too harsh. In equal protection analysis, at least, it is almost impossible to show a compelling state interest. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972); *see generally* L. Tribe, American Constitutional Law § 16-6 (1978). And, in a title VIII case, a requirement that a zoning ordinance be defended by a showing of a compelling interest would lead to anomalous results, because it is hard to imagine any zoning ordinance that *has* to be the way it is. Because the *Arlington Heights II* test leaves breathing room for the countless fact patterns that courts may encounter in title VIII zoning cases, this court chooses to follow the approach of the Seventh Circuit, which, it appears, is not foreclosed by any precedent of the Second Circuit.

III. *Disputed Facts*

As seen in Part I, the parties agree on many of the "objective" facts in the case: statistics, texts of documents, dates on which events took place. Generally, the disagreements are over more subjective matters, such as intentions, shades of meaning, and recollections of conversations.

The court finds that the following facts have been established by the preponderance of credible evidence in the case. HHI is unable to proceed with the Matinecock Court project, which is designed to be a 162-unit housing project for lower-income families, unless the parcel of land in question is zoned for multi-family use. HHI is a Huntington-based, non-profit housing civil rights organization. HHI was founded in 1967 and has a multi-racial board. Ulysses Spicer, its president, is black.

The Huntington Branch NAACP, a branch of the national office of the NAACP, has approximately 200 members, most of whom are black. It seeks to eliminate housing discrimination and promote integration.

HHI decided, in about 1978, to build a subsidized, lower-income housing project for Huntington. It hoped to obtain "section 8" funds from the Department of Housing and Urban Development (HUD). HHI asked Suffolk Community Development Corp. (SCDC) to look for suitable sites. SCDC identified eighteen potential sites in Huntington.

On various occasions, HHI's executive director, Marianne Garvin, consulted with Michael Miness, the director of Huntington's Community Development Agency, about HHI's plans to build section 8 housing in the town. The Matinecock Court project could not be built without multi-family zoning, since the project requires densities of ten to twelve units per acre.

In 1979, HHI retained Alan Mallach, a housing specialist, to help in the search of an appropriate site for HHI's section 8 project. HHI set various criteria: the project had to be located outside the "racially impacted" areas of town, in order to foster integration; it had to be accessible to major roadways and public transportation; it had to be reasonably accessible to schools and community facilities; it had to be readily developable and affordable; it could not have a significant impact on the immediate neighborhoods or adjacent land uses; and it had to be available with a lengthy option, to permit HHI to put together the elements of the project.

The only vacant site zoned under the R-3M classification for multi-family housing was in the Town's Urban Renewal area, where HHI did not wish to build, because that area already had a substantial minority population. In other words, HHI be-

lieved that building on this site—the MIA parcel—would not serve the purposes of integration. Thus, HHI conducted its search for a site without being guided by the contemporary state of the Town's zoning map.

In late 1980 and early 1981, HHI's attention focussed on the 14.8-acre vacant site at the intersection of Elwood and Pulaski. Mallach evaluated the site favorably, though it was zoned under the R-40 classification, which provides for single-family homes on lots of at least one acre. On January 23, 1980, HHI obtained an option on the Elwood-Pulaski site. The option provided for annual payments of $5,000, with purchase dependent upon HHI obtaining multi-family zoning.

The parties dispute whether Miness initially concurred orally in the suitability of the site for HHI's project; after Garvin met Miness, she sent him a letter stating that he had, and his responding letter said that he had not. Plaintiffs argue that Garvin testified at trial and Miness did not, so Garvin should be believed. But the court need not resolve this dispute in order to decide the case.

Representatives of HHI met with members of the Town Board on February 22, 1980. HHI asked that the meeting be confidential, and all four members of the Board who were present gave such assurance. When HHI's representatives asked for a zoning change for the Elwood-Pulaski site, the Board members refused to discuss the substance of the request, because New York State's Open Meetings Law, N.Y.Pub. Off.Law §§ 100-111 (McKinney supp. 1987), barred their doing so. Specifically, section 103 provides for open meetings of public bodies, section 104 requires public notice of meetings, and section 107(1) permits a court to void action taken in violation of the law.

In any event, Robert Ralph, a director of HHI, addressed the Town Board on February 26, 1980, at a public hearing held to secure comments on the Town's 1980-81 CDBG application. He filed a document that purported to be a proposed amendment to the Town's zoning ordinance, which requested "a commitment by the Town to amend the zoning ordinance to allow multi-family rental construction by a private developer." Between February 26, 1980 and August 1980, when HHI applied

for section 8 funds for Matinecock Court, there was no substantive communication between HHI and Supervisor Butterfield or any other member of the Town Board.

The court concludes that HHI never filed an application to rezone its option property to R-3M status. On cross-examination, Garvin testified as follows:

> Q Now, did anybody, in fact, ever file a rezoning application form at Matinecock Court?
>
> A No.
>
> Q At any time?
>
> A No.
>
> Q When you became executive director of Housing Help, did you learn of the general nature of the comprehensive master plan of the town of Huntington?
>
> A Not at that time, no.
>
> Q Did you learn anything about the master plan at any time before February 22, 1980?
>
> A No.
>
> Q Did you know that there was a master plan?
>
> A I don't remember at what point I became aware of that.
>
> Q Did you ever meet with the Director of Planning of the town of Huntington at any time during your entire tenure as Executive Director of Housing Help?
>
> A No.

Tr. 1116.

On cross-examination, Ralph testified about the unofficial meeting of February 22, 1980 and his understanding of zoning procedures:

> Q Did you think it was perfectly proper to meet with a majority of the Town Board members in closed session which was not previously advertised to the public?
>
> A It never occurred to me that there was any problem with that.

I would think if there was a problem they would have brought it to our attention.

Q You didn't think there was a problem?

A I was not aware of any problem.

Q Were you familiar with the rezoning procedures in Huntington before you went to that meeting?

A That's we needed for—

Q No. I am asking—

A No, I should say no.

Q Did you know there was such a thing of [sic] zoning application form with instructions that was issued by the tone [sic] of Huntington that was in existence and in use at that time?

A I don't believe I was.

Tr. 1994-95.

In light of the court's conclusion that plaintiffs never applied for rezoning, it follows that plaintiffs have failed to make out a *prima facie* case. As discussed earlier, the Second Circuit has construed the second of the four *McDonnell Douglas* factors, in the context of a title VIII action, as a showing "that [plaintiff] applied for and was qualified to rent or purchase the housing." *Robinson, supra*, 610 F.2d at 1038. *Mutatis mutandis*, the requirement in this action would be a showing that plaintiffs applied for a zoning change. That showing has not been made; therefore, plaintiffs' title VIII claim must fail.

But even if the court were willing to assume that a rezoning application had been made, in substance if not in form, the conclusion would be the same: plaintiffs are not entitled to relief on their title VIII claim. The Town urges the court to find, assuming plaintiffs had applied for rezoning, that a *prima facie* case still had not been made out, because there was no showing of a discriminatory effect, let alone discriminatory intent. Although the court is not in full agreement with defendants' characterization of the evidence, the court is persuaded that plaintiffs have not made out a *prima facie* case or, alternatively, if they made out a *prima facie* case, it was rebutted by an articulation of legitimate, non-discriminatory reasons for the Town's acts and omissions—reasons that have not been shown to be pretextual. To summarized, there are three alternative reasons that plaintiffs' title VIII claim fails:

(1) There was no application for a zoning change, so the second *McDonnell Douglas* element is missing and there is no *prima facie* case;

(2) Under the four-factor analysis of *Arlington II*, plaintiffs have not made out a *prima facie* case; and

(3) Even if plaintiffs have made out a *prima facie* case, it has been rebutted by legitimate, nondiscriminatory reasons that have not been exposed at pretextual.

The court has explained the basis for its first alternative holding; what follows is a discussion of the second and third alternative holdings.

The second alternative holding—that plaintiffs have not made out a *prima facie* case under the four-part test of *Arlington Heights II*—is not predicated upon a total agreement with defendants' view of the evidence, but rather upon a view of the evidence as a whole. Thus, the court does not believe, as defendants argue, that plaintiffs have failed utterly to show a discriminatory effect. The evidence adduced by plaintiffs showed that the Town has a shortage of rental housing affordable for low- and moderate-income households and that a disproportionately large percentage of the households using subsidized rental units for families in Huntington are minority citizens. In this connection, it is relevant that 74% of those on the waiting list for Gateway Gardens are members of minority groups, as are 45% of those on the Lincoln Manor waiting list and 61% of those on the waiting list for existing section 8 certificates. While it is true that no one can predict with absolute certainty what the racial composition would have been at Matinecock Court, had the project been built, the evidence supports a finding that a significant percentage of the tenants would have belonged to minority groups.

Having said that the construction of Matinecock Court would have provided housing accommodation for members of

minority groups, the court is constrained to observe that the showing is not overwhelmingly strong. This is the first factor of *Arlington Heights II*: how strong is the showing of discriminatory effect? The showing is not particularly strong because the population of those with incomes at or below 200% of the poverty level, within the Town, consisted of 22,160 white persons and 3671 black, Hispanic, and Asian persons, according to the 1980 census. To qualify for service by the Huntington Housing Authority, one had to have an income at or below 185% of the poverty level. The statistics regarding those at or below 200% provide a fairly close approximation of the ratios that would be found at 185% and demonstrate that the beneficiaries of low- and moderate-income housing might not come disproportionately from minority groups. Nor do the waiting lists for Lincoln Manor, Gateway Gardens, and section 8 existing certificates provide a fool-proof barometer of the likely population of Matinecock Court.

Turning to the second factor of *Arlington Heights II*—evidence of discriminatory intent—the court notes that this is the least important of the four factors, and has been read out of the test entirely by the Sixth Circuit in *Arthur v. City of Toledo, Ohio, supra*. But to the extent that discriminatory intent is a factor, it cuts in favor of the defendants.

For one, the court has found that there was no formal application for a zoning change, which leads to the conclusion that the failure to rezone for Matinecock Court was not motivated by discriminatory intent. What is more, plaintiffs have been unable to show that the Town had a history of perpetuating segregation by confining subsidized housing to the Huntington Station area. Plaintiffs have not proved a segregative intent or effect in connection with the establishment of Gateway Gardens or Whitman Village, or the rehabilitation of the Lincoln School. Nor is there persuasive proof that enactment or implementation of the zoning code has perpetuated segregation or been motivated by discriminatory impulses. The same may be said of the Town's policy regarding section 8 existing and rehabilitation programs.

In a discrimination action, a court cannot be satisfied that the absence of overtly discriminatory remarks proves an absence of

discrimination. Yet it is worthy of at least some note that there has been no serious contention that any member of the Town Board made racist remarks. This is by no means a suggestion that findings of discrimination can be avoided by careful use of code words. Rather, the court observes that people who wish to discriminate often slip from using code words into saying what they are thinking. That, at least, did not happen here. In short, the flavor of the evidence and the demeanor of the witnesses did not give rise to an aura of discriminatory intent.

The third factor of *Arlington Heights II* is the defendant's interest in taking the action of which plaintiff complains. The court finds that defendants' acts and omissions with respect to the zoning process and housing in general were supported by rational and legitimate concerns. In addition to several of the facts discussed earlier, which tend to show that defendants' decisions were made for good reasons, the court notes that the Town is approximately 90% developed, and there is not much leeway any longer for radical change in the face of the real estate. In his October 14, 1980 letter to HUD, recommending rejection of the Matinecock Court project, Supervisor Butterfield listed seven reasons that the project should not be built: (1) inconsistency with the Town's Housing Assistance Plan; (2) inconsistency with zoning; (3) traffic considerations; (4) site plan problems; (5) proximity to the railroad and Long Island Lighting Company substation; (6) inadequate recreation and play areas; and (7) undersized and unrealistic units. It would beg the question to assert the first two stated reasons in the context of deciding whether or not the Town's HAP and zoning ordinance violated title VIII. But the other five reasons were supported by the evidence and do provide legitimate, nondiscriminatory reasons for the Town's conduct. In other words, the court believes that defendants have shown a strong interest in pursuing the course of conduct that they followed.

The fourth *Arlington Heights II* factor cuts in favor of plaintiffs, because they did not ask the Town affirmatively to provide housing, only to permit housing to be built. But the court determines that the first three factors in this four-part test weigh sufficiently in defendants' favor to support the second alternative holding, i.e., that, even assuming a rezoning applica-

tion had been made, plaintiffs failed to make out a *prima facie* case.

It could be argued, however, that a weighing of the four *Arlington Heights II* factors would support a conclusion that plaintiffs established a *prima facie* case. If so, the court's third alternative holding still compels a judgment in favor of the defendants. This is because the Town has shown legitimate, nondiscriminatory reasons for its conduct, and those reasons have not been exposed as pretextual. The basis for this finding is evident in the court's discussion of its first two alternative holdings, and will not be repeated here. It suffices to say that even if plaintiffs are deemed to have made a rezoning application, and even if the facts and circumstances are then such as to state a *prima facie* case, that case has been rebutted successfully by the defendants, who were faced with numerous policy considerations and reached their decisions for legitimate reasons.

In light of the foregoing conclusions, it is not necessary to detail the reasons that plaintiffs' claims under the equal protection clause and 42 U.S.C. §§ 1982 and 1983 fall short of the mark. For these claims, the standard of proof is as high as it is under title VIII, *see Selden Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir.1986), or higher, *see Washington v. Davis, supra.* The judgment for defendants on the title VIII claim forecloses relief for plaintiffs on the other federal claims.

Remaining is the claim that defendants violated the New York Town Law and *Berenson v. Town of New Castle, supra.* This claim, too, must fail. In *Berenson*, the New York Court of Appeals stated:

> In determining the validity of an ordinance excluding multi-family housing as a permitted use, we must consider the general purposes which the concept of zoning seeks to serve. The primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land. By balanced, we do not mean to imply that a community must maintain a certain quantitative proportion between various types of development. Clearly, such a requirement would rub against one of the basic purposes

> of zoning, which is to provide in an orderly fashion for actual public need for various types of residential, commercial and industrial structures.
>
> Similarly, the town is free to set up various types of use zones. There is no requirement that each zone must contain some sort of housing balance. Our concern is not whether the zones, in themselves, are balanced communities, but whether the town itself, as provided for by its zoning ordinances, will be a balanced and integrated community. *Thus . . . if a district is set aside for multiple-dwelling development, there is no requirement that other portions of a town contain such developments.*

38 N.Y.2d 102, 109-10, 341 N.E.2d 236, 241-42, 378 N.Y.S.2d 672, 680 (1975) (citations omitted; emphasis added).

In light of the findings made by the court on plaintiffs' federal claims, there can be little question as to the outcome of the *Berenson* claim. Simply put, the Town has "provided a properly balanced and well ordered plan for the community," as required by the first part of the *Berenson* test, *id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 680, and it has given sufficient consideration to "regional needs and requirements," *id.*, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

More recently, the court of appeals has dealt with an attack on the implementation of a zoning ordinance, whereas *Berenson* involved a facial attack. *Suffolk Housing Services v. Town of Brookhaven*, 70 N.Y.2d 122, 130, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 926 (1987). Against the background of findings of fact that the defendant had not caused the claimed housing shortage, *id.*, 511 N.E.2d at 70, 517 N.Y.S.2d at 926, the court "decline[d] to take the legislative action urged by plaintiffs in the context of this lawsuit," *id.* at 132, 511 N.E.2d at 71, 517 N.Y.S.2d at 927. The same reasoning applies here: inasmuch as the court has found that the Town's plan is properly balanced and well ordered, and sufficiently considers regional requirements—if anything, Huntington has been a leader in providing public housing in Suffolk County—the Town's zoning ordinance survives facial attack and is not infirm as applied, either.

IV. *Conclusion*

The problems associated with providing housing for low- and moderate-income persons in contemporary suburbs are not susceptible of easy resolution. The law commands the extirpation of racial discrimination in housing, as it does in employment, education, voting rights, and other aspects of life. But this command does not imply that everyone will be able to live where he or she chooses, because there are competing considerations of economics and space that often make impossible that which is desirable. The court has no doubt of the sincerity of plaintiffs, as individuals and as organizations, in their attempt to improve housing opportunities for residents of Huntington and its environs. The court is compelled to conclude, however, that plaintiffs have failed to prove a violation by defendants of either federal or state law. Accordingly, the clerk is directed to enter judgment in favor of defendants, but with no costs to either side, Fed.R.Civ.P. 54(d). The foregoing constitutes the court's findings of facts and conclusions of law. *Id.* 52(a).

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 81-0541 (ILG)

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD, and KENNETH L. COFIELD,

Plaintiffs,

—against—

THE TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON, and JOSEPH CLEMENTE,

Defendants.

JUDGMENT

A memorandum and order of Honorable I. Leo Glasser, United States District Judge, having been filed on September 14, 1987, making findings of fact and conclusions of law, and directing the Clerk of the Court to enter judgment in favor of the defendants with no costs to either side pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, it is

ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants; and that judgment is hereby entered in favor of the defendants with no costs to either side pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

/s/ ROBERT C. HEINEMANN
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
September 16, 1987

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. 87-7892

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Appellants, Town of Huntington, New York, Kenneth C. Butterfield, Clair Kroft, Kenneth Deegan, Edward Thompson and Joseph Clemente, hereby appeal to the Supreme Court of the United States from a certain judgment of the United States Court of Appeals for the Second Circuit docketed April 5, 1988 which declared invalid as repugnant to 42 U.S.C. § 3604 a portion of § 198.20 of the Code of the Town of Huntington, New York, and granted site-specific relief. This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: Melville, New York
April 21, 1988

/s/ RICHARD C. CAHN
Richard C. Cahn,
Special Counsel to the
Town of Huntington

CAHN WISHOD WISHOD & LAMB
Attorneys for Appellants
534 Broadhollow Road
CB-179
Melville, New York 11747
(516) 694-2300

TO: RICHARD F. BELLMAN, ESQ.
Steel Bellman & Levine, P.C.
Attorneys for Appellees
351 Broadway
New York, New York 10013
(212) 925-7400

GROVER C. HANKINS, ESQ.
Attorney for Appellees
General Counsel
National Association for
the Advancement of
Colored People
4805 Mount Oak Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

CERTIFICATE OF SERVICE

I, RICHARD C. CAHN, an attorney duly admitted to the Bar of the Supreme Court of the United States, do hereby certify that service of the foregoing Notice of Appeal has been made upon all of the parties required to be served therewith, to wit:

Richard F. Bellman, Esq.
Steel Bellman & Levine, P.C.
351 Broadway
New York, New York 10013

Grover G. Hankins, Esq.
4805 Mount Oak Drive
Baltimore, Maryland 21215-3297

by depositing a true copy of the same in the United States Post Office at Melville, New York, with first-class postage, prepaid, addressed to each of the foregoing counsel of record at the aforementioned post office addresses, on the 21st day of April, 1988.

/s/ RICHARD C. CAHN
Richard C. Cahn

42 U.S.C. § 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by section 3603(b) and 3607 of this title, it shall be unlawful—(a) To refuse to sell or rent . . . or otherwise make available or deny, a dwelling to any person because of race, color, religion, sex or national origin.

New York Town Law § 261 (McKinney 1987)

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes . . .

New York Town Law § 262 (McKinney 1987)

For any or all of said purposes the town board may divide that part of the town which is outside the limits of any incorporated village or city into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings, throughout such district but the regulations in one district may differ from those in other districts.

New York Town Law § 263 (McKinney 1987)

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to make provision for, so far as conditions may permit, the accommodation of solar energy systems

and equipment and access to sunlight necessary therefor; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality.

New York Town Law § 264 (McKinney 1987)

The town board shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restrictions or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least ten days' notice of the time and place of such hearing shall be published in a paper of general circulation in such town and a written notice of any proposed change or amendment affecting property within the protectively zoned area of a housing project authorized under the public housing law, as such area is shown on an approved zoning map filed with the town officer charged with enforcement of zoning regulations, or property within five hundred feet of the boundaries of any city, village, town, county, state park or parkways shall be given, in the case of a housing project to the housing authority erecting or owning the project and to the government providing financial aid or assistance thereto, in the case of any state park or parkway, to the regional state park commission having jurisdiction over such state park or parkway, in the case of a city, village or town to the clerk of such city, village or town, and in the case of a county, to the clerk of the board of supervisors or other person performing like duties, at least ten days prior to the date of such public hearing. Such city, village, town or county shall have the right to appear and to be heard at such public hearing with respect to any such proposed change or amendment, but shall not have the right of review by a court as hereinafter provided.

Every zoning ordinance and every amendment to a zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such zoning ordinance or amendment and a copy thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance or amendment shall take effect from the date of its service as against a person served personally with a copy thereof, certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each and every map adopted in connection with a zoning ordinance or amendment and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

New York Town Law § 265 (McKinney 1987)

Such regulations, restrictions and boundaries may from time to time be amended, supplemented, changed, modified or repealed by ordinance. In case, however, of a protest against such change signed by the owners of twenty per centum or more, either of the area of the land included in such proposed change, or of that immediately adjacent extending one hundred feet therefrom or of that directly opposite thereto, extending one hundred feet, from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of at least three-fourths of the members of the town board. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

Changes, amendments or supplements made to any zoning ordinance (excluding any map incorporated therein) adopted pursuant to the provisions of this chapter shall be entered in the minutes of the town board; such minutes shall describe and refer to any map adopted in connection with such change, amendment or supplement and a copy thereof (exclusive of any map incorporated therein) shall be published once in a newspaper published in the town, if any, or in such newspaper published in the county in which such town may be located having a circulation in such town, as the town board may designate, and affidavits of the publication thereof shall be filed with the town clerk. Such ordinance shall take effect ten days after such publication, but such ordinance shall take effect from the date of its service as against a person served personally with a copy thereof certified by the town clerk under the corporate seal of the town; and showing the date of its passage and entry in the minutes. Every town clerk shall maintain a separate file or filing cabinet for each and every map adopted in connection with any change, amendment or supplement made to any zoning ordinance and shall file therein every such map hereafter adopted; said file or filing cabinet to be available at any time during regular business hours for public inspection.

Code of the Town of Huntington, § 198-20

* * *

A. Use regulations. In the R-3M Apartment District, a building or premises shall be used only for the following purposes:

(1) Any use permitted in the R-80, R-15 and R-5 Residence Districts.

(2) Multiple-family dwellings which constitute an approved public housing project to be owned, maintained and operated by the Housing Authority of the Town of Huntington.

(3) Multiple-family dwellings where such dwellings constitute an element in a formally approved land use or reuse plan for all or part of an urban renewal area which has been designated as such under the provisions of Article 15 of the General Municipal Law.

* * *

Code of the Town of Huntington, § 198-126

The Town Board may from time to time amend, supplement, modify, repeal or change this chapter or the Zoning Map on its own motion or on petition, application or on recommendation of the Planning Board.

Code of the Town of Huntington, § 198-127

The Town Board may refer a proposed amendment to the Planning Board for recommendation and written report thereon. The Town Board may specify a reasonable time within which such report shall be submitted, and no public hearing shall be held upon any amendment until such report has been received or until the specified time has elapsed without such report having been received.

Code of the Town of Huntington, § 198-128

Application to amend this chapter may be made by any property owner. The Town Board may schedule a public hearing to consider such application.

Code of the Town of Huntington, § 198-129

A. By resolution adopted at a regular meeting of the Board, the Town Board shall fix the time and place of any public hearing upon an amendment to this chapter and shall give at least ten (10) days' notice thereof by publishing a notice in the official town newspaper as required by law and by posting a printed copy of such notice on the signboard maintained by the Town Clerk pursuant to § 30, Subdivision 6, of the Town Law.

B. Notice of hearing shall state the location of the building or premises, the name of the owner and applicant and the general nature of the application.

C. In addition to the foregoing requirements, notice of any public hearing called pursuant to § 198-126 or 198-128 of this chapter to consider an amendment to the Zoning Map shall be given by mailing or serving a notice thereof to the owners of the subject property and of all adjoining property within two hundred (200) feet of the exterior limits of the applicant's total

property holding, as shown on the latest assessment roll. The applicant shall be required to make such notification, when the hearing is noticed pursuant to § 198-128, and proof of service shall be submitted to the Town Clerk no less than fourteen (14) days prior to the date of the hearing. In cases where the Town Board, on its own motion, or on recommendation of the Planning Board, initiates an amendment, supplementation, modification, repeal or change in the zoning map, which would affect only one (1) contiguous parcel of land, the Town Board shall, by and through its designated agent, the Planning Department of the Town of Huntington, give notice of any prospective public hearing by mailing or serving a notice thereof to the owners of the subject property and to the owners of the adjoining property within two hundred (200) feet of the exterior limits of the property which is the subject of the prospective hearing. Such notice shall be given not less than thirty (30) days prior to the date of hearing. The Town Board shall not call a public hearing upon any proposed zoning amendment until the applicant, excluding the Town Board or Planning Board, has paid the required filing fee to the Town Clerk and complied with the requirements of this section and with applicable disclosure requirements.

D. In addition to notifying adjoining property owners by mail, the applicant or his agent shall erect a sign on each frontage of the property announcing the date, time and place of the public hearing. In cases where the Town Board, on its own motion, or upon recommendation of the Planning Board, initiates an amendment, supplementation, modification, repeal or change in the zoning map, which would affect only one (1) contiguous parcel of land, the Town Board, by and through its designated agent, the Planning Department of the Town of Huntington, shall erect, or arrange for the erection of, the sign referred to herein. Said sign shall be placed at the center of the frontage and shall not be more than ten (10) feet from the street line. It shall not be less than two (2) feet nor more than six (6) feet above grade. The sign shall be erected on the property not more than ten (10) days nor less than five (5) days prior to the public hearing, and an affidavit of posting shall be submitted to the Town Clerk not less than four (4) days prior to the date of

the hearing. The applicant shall be responsible for the removal of the sign within three (3) days after the hearing.

Code of the Town of Huntington, § 198-130

Any applicant or petitioner who requests an amendment to the Zoning Map shall submit to the Town Clerk with the application for such amendment an original drawing and three (3) copies thereof of a survey of the property for which an amendment is requested, prepared by a land surveyor or engineer currently licensed by the State of New York. The original survey shall be in ink on tracing cloth on a sheet size of eight and one-half by eleven (8½ x 11) inches and shall show the property in question and adjoining property on which the zoning is designated by standard symbols shown on the official Zoning Map. The bottom five (5) inches of the survey map shall remain blank for insertion of a written description of the proposed amendment by the Town Clerk. A written description of the proposed amendment shall accompany the survey and application.

Code of the Town of Huntington, § 198-131

Any amendment to these regulations shall, upon adoption, be entered in the minutes of the Town Board and shall be published and posted according to law.

MOTION

Supreme Court, U.S.
FILED
JUN 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1961

In The

Supreme Court of the United States

October Term, 1987

TOWN OF HUNTINGTON, NEW YORK, KENNETH C. BUTTERFIELD, CLAIR KROFT, KENNETH DEEGAN, EDWARD THOMPSON and JOSEPH CLEMENTE,

Appellants,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, HOUSING HELP, INC., MABEL HARRIS, PERREPPER CRUTCHFIELD and KENNETH L. COFIELD,

Appellees.

MOTION TO DISMISS OR AFFIRM

STEEL BELLMAN & LEVINE, P.C.
Attorneys for Plaintiffs-Appellees
351 Broadway
New York, New York 10013
(212) 925-7400

GROVER G. HANKINS
Attorney for Plaintiffs-Appellees
General Counsel
National Association for the Advancement of Colored People
4805 Mount Oak Drive
Baltimore, Maryland 21215-3297
(301) 358-8900

On the Brief:
RICHARD F. BELLMAN
LEWIS M. STEEL
MIRIAM F. CLARK

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30pp

QUESTIONS PRESENTED

1. Whether appeal properly lies pursuant to 28 U.S.C. §1254(2) when appellants admit they have not relied on the statutory provision held invalid by the Court of Appeals and when the judgment of the Court of Appeals itself does not strike the ordinance provision in question.

2. Whether the Court of Appeals' opinion below raises a substantial issue warranting this Court's review when it interprets the Fair Housing Act (Title VIII) in a manner consistent with decisions of at least five other Courts of Appeals and when there is no conflict among the Circuits.

PARTIES TO THE PROCEEDING

Appellants: The Town of Huntington, New York; Kenneth C. Butterfield; Clair Kroft; Kenneth Deegan; Edward Thompson; and Joseph Clemente.

Appellees: Huntington Branch, National Association for the Advancement of Colored People; Housing Help, Inc.; Mabel Harris as President of the Huntington Branch, National Association for the Advancement of Colored People; and Perrepper Crutchfield and Kenneth L. Cofield, individually, and in their capacity as representatives of the certified class.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF THE FACTS	2
A. Huntington's Population and Low Cost Housing Need	3
B. Housing Help's Effort to Secure Multi-Family Zoning for its Project	6
C. Huntington's Claim That the R-3M Provision Was Expanded Pursuant To An Opinion of the Town Attorney	8
D. Huntington Has Repeatedly Varied the Stated Reasons For Opposing the HHI Project and These Stated Reasons Are Clearly Insufficient	10
ARGUMENT	12
I. APPEAL UNDER §1254(2) DOES NOT LIE IN THIS CASE BECAUSE APPELLANTS DO NOT RELY ON A STATE STATUTE HELD BY A COURT OF APPEALS TO BE INVALID	12
II. THE QUESTIONS RAISED BY APPELLANTS ARE UNSUBSTANTIAL AND THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING ANY OF THE ISSUES RAISED	15
III. HUNTINGTON'S RELIANCE ON ITS ZONING AUTHORITY DOES NOT SHIELD IT FROM TITLE VIII LIABILITY	19

TABLE OF CONTENTS–Continued

Page

IV. THE RELIEF ORDERED BY THE COURT OF APPEALS RAISES NO SUBSTANTIAL QUESTION WARRANTING REVIEW BY THIS COURT 20

V. THERE IS NO BASIS FOR DISMISSING APPELLEES' CLAIM ON STANDING OR MOOTNESS GROUNDS 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES CITED

Arthur v. City of Toledo, Ohio, 782 F.2d 565 (6th Cir. 1986) 15

Ashcroft v. Mattis, 431 U.S. 171 (1977) 14

Betsey v. Turtle Creek Associates, 736 F.2d 938 (4th Cir. 1984) 15

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 2

Burger King Corp. v. Rudewicz, 471 U.S. 462 (1985) 13

Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) 13

Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974) 13

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 15, 16, 17, 18, 19

Hanson v. Veterans Administration, 800 F.2d 1381 (5th Cir. 1986) 15

Huntington Branch NAACP, et al. v. Town of Huntington, et al. (Huntington I), 689 F.2d 391 (2d Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983) 7, 22

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982) 3

Metropolitan Housing Dev. Corp. v. Village of Arlington Heights (Arlington Heights I), 429 U.S. 252 (1977) 18

Metropolitan Housing Dev. Corp. v. Village of Arlington Heights (Arlington Heights II), 558 F.2d 1283 (7th Cir. 1977), *cert. den.*, 434 U.S. 1025 (1978) 16, 17

TABLE OF AUTHORITIES–Continued

Page

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 13

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 3

Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. den.*, 435 U.S. 908 (1978) 15, 18

Silkwood v. Kerr McGee Corp., 464 U.S. 238 (1984) 13

Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. den.*, 423 U.S. 808 (1975) 17

United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. den.*, 422 U.S. 1042 (1975) 16, 17, 18, 20

United States v. City of Parma, 494 F.Supp. 1049 (N.D. Ohio 1980), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. den.*, 456 U.S. 1012 (1982) 16

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 19

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 19

STATUTES CITED

Title VIII of the Civil Rights Act of 1968, the Fair Housing Law, 42 U.S.C. §§ 3601, *et seq.* 2, 15, 16, 17, 18, 19

28 U.S.C. §1253 13

28 U.S.C. §1254(2) 1, 12, 15, 23

RULES CITED

Federal Rules of Civil Procedure 52(a) 2

No. 87-1961

In The

Supreme Court of the United States

October Term, 1987

TOWN OF HUNTINGTON, NEW YORK, ET AL.,

Appellants,

v.

HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Appellees.

On Appeal from the United States Court of Appeals for the Second Circuit

MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, in accordance with Rule 16.1(c) and (d) of this Court's rules, to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Appeals for the Second Circuit on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellees show in this motion that this appeal should not be heard for the following reasons: (1) no appeal lies to this Court pursuant to 28 U.S.C. § 1254(2)

because the Court of Appeals did not invalidate a provision of a local ordinance on which appellants rely; and (2) the questions on which the decision in this case depend are so unsubstantial as not to require briefs on the merits or argument in their resolution. The Court of Appeals did no more than apply established doctrine under Title VIII of the Civil Rights Act of 1968, the Fair Housing Law, 42 U.S.C. §§ 3601, *et seq.*, to uncontroverted facts and there is no conflict between the Courts of Appeals requiring resolution by this Court. Accordingly, the judgment below is correct.

The appellants in their Jurisdictional Statement accurately set forth the procedural history of this matter. The Statement is replete, however, with incorrect factual claims and claims unsupported by any judicial findings of fact at either the district court or Court of Appeals level. In light of the factual misrepresentations, appellees will first address certain factual issues.

STATEMENT OF THE FACTS

Appellants assert in their Jurisdictional Statement that the Court of Appeals engaged in unauthorized fact finding. This is not the case. The Court of Appeals carefully explained that it was following this Court's instruction that Rule 52(a) of the Federal Rules of Civil Procedure " 'does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.' *Bose Corp. v. Consumers Union of the United States,*

Inc., 466 U.S. 485, 501 (1984); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855, n. 15 (1982)" (23-24a).[1] With this precept in mind, the Second Circuit reviewed the district court findings regarding the strength of the showing of discriminatory effect and the sufficiency of the Town's stated justifications for opposing the housing project (23a-24a).

A. Huntington's Population and Low Cost Housing Need

In its Jurisdictional Statement, Huntington attempts to give the impression that it is a racially integrated community which has met the housing needs of its less affluent residents. That is not the case. As the Second Circuit noted, Huntington is an "overwhelmingly white suburb" whose zoning regulations restrict private multifamily housing projects to the largely minority "urban renewal area" (3a), and which has "demonstrated little good faith in assisting the development of low cost housing" (34a). It is undisputed that in 1980, the Town's population was approximately 197,000, of whom 3.35% were black. This small black population is clearly residentially segregated, being heavily concentrated in the

[1] In this brief, references with the symbol "a" refer to the Appendix to appellants' Jurisdictional Statement; the symbol "T" refers to the Joint Appendix Transcript volume filed in the Court of Appeals; the symbol "E" refers to the Joint Appendix Exhibit volume filed in the Court of Appeals; and the symbol "A" refers to the Joint Appendix filed in the Court of Appeals.

areas known as Huntington Station and South Greenlawn. The Second Circuit noted the undisputed fact that "43% of the total black population lived in four census tracts in Huntington Station and 27% in two census tracts in the South Greenlawn area. Outside these two neighborhoods, the Town's population was overwhelmingly white" (5a). Thirty of the Town's 48 census tracts contained black populations of less than 1% (5a).

Under the R-3M section of Huntington's zoning ordinance, privately developed multi-family housing is limited to the Town's urban renewal area. The R-3M provision allows the Huntington Housing Authority to build multi-family housing townwide.

The district court found that there is a large unmet need for low cost subsidized housing among Huntington's low income population and that this need disproportionately falls upon minority residents (81a). Thus, the Second Circuit noted, "The Town's Housing Assistance Plan (HAP), which is adopted by the Town Board and filed with HUD as part of Huntington's application for federal community development funds, reveals that the impact of this shortage [of low cost housing] is three times greater on blacks than on the overall population. Under the 1982-1985 HAP, for example, 7% of all Huntington families required subsidized housing, while 24% of black families needed such housing" (5a).

Consistent with this pattern of a disproportionate need for low cost housing among minority persons in Huntington, the Second Circuit stated that "a disproportionately large percentage of families in existing subsidized projects are minority" (5a). At time of trial, in

Gateway Gardens, a 40 unit public housing project built in 1967, 95% of the units were occupied by minority households and 74% of those on the waiting list were minority. In Whitman Village, a 260 unit HUD-subsidized development built in 1971, 56% of the units were occupied by minority households. In Lincoln Manor, another HUD-subsidized project built in 1980, 30% of the units were occupied by minority households and 45% of those on the waiting list were minority. Under the HUD existing Section 8 program, lower income families can obtain rent subsidies from the Housing Authority as long as they locate their own housing unit. In 1984, 68% of the families obtaining these subsidies and 61% of those on the waiting list were minority (5a).

Moreover, on the basis of undisputed facts, the Second Circuit noted that despite "a disproportionate number of minorities need low-cost housing, the Town has attempted to limit minority occupancy in subsidized housing projects" (6a). The record establishes that Town officials attempted to impose quotas limiting minority occupancy in the Lincoln Manor project and in an aborted project proposed for the urban renewal area (6a). This latter project was abandoned when the Town Board "unanimously passed a resolution withdrawing its support for the project because they could not 'ensure a particular ethnic mix' " (6a).

There is also a clear pattern of segregation of subsidized housing in Huntington. All three projects for low income families are located in the disproportionately minority Huntington Station area. Gateway Gardens and Whitman Village are adjacent to each other in the urban renewal area and are located in census blocks with more

than 40% minority residents. Lincoln Manor is located a few blocks away in a disproportionately minority census block (7a-8a).

B. Housing Help's Effort to Secure Multi-Family Zoning for its Project

The Second Circuit observed that, from the outset of its effort to create a racially integrated low cost housing project, Housing Help, Inc. (HHI) sought the assistance of Huntington officials. Specifically, HHI's Executive Director, Marianne Garvin and HHI Board members approached Michael Miness, Director of Huntington's Community Development Agency. Miness responded affirmatively to HHI's request for assistance and numerous meetings were held among him and HHI officers (8a-9a).

Because of the restrictive nature of the R-3M provision, HHI representatives repeatedly asked Miness for help in securing multi-family zoning for whatever parcel the organization ultimately obtained. Miness assured HHI that multi-family zoning would not be a problem because the Town Board would amend the ordinance if it supported the organization's project (9a).

In 1980, HHI obtained an option to purchase a 14.8 acre site on the corner of Elwood and Pulaski Roads. The Second Circuit noted, "This flat, largely cleared and well-drained property was near public transportation, shopping and other services, and immediately adjacent to schools. Ninety-eight percent of the population within a one-mile radius of the site is white. HHI set a goal of 25%

minority occupants. The district court found that 'a significant percentage of the tenants [at Matinecock Court] would have belonged to minority groups' " (9a).

HHI officials decided that the first step to be taken to obtain R-3M zoning for the project would be to ask the Town Board to amend the R-3M provision to permit privately built multi-family housing townwide. In the event of such a revision, HHI would then be able to apply for a zoning map change for its parcel. This approach was consistent with the structure of the Town zoning ordinance, which provides different procedures for amending the ordinance and for applying for a zoning map change. As the Court of Appeals concluded, HHI clearly followed the appropriate local procedure for changing the zoning code, the necessary first step in securing a multi-family zoning map change for HHI's project (14a).

There is no dispute that HHI requested the Town Board to amend the code to allow R-3M zoning townwide. HHI made a written proposal to the Town Board at an informal meeting with Town Board members on February 22, 1980 and at a formal Board meeting on February 26, 1980. On numerous occasions thereafter, HHI's Director followed up with inquiries about this request to the Town Board and other Town officials. As the Second Circuit stated, "During the numerous contacts with HHI directors and members, Town officials never mentioned that HHI should be pursuing a different application process. Both parties thus clearly understood that an application for a zoning change had been made. As this Court determined in *Huntington I*, no further petitions, formal or informal, were necessary" (14a, referring to *Huntington Branch NAACP, et al. v. Town of Huntington, et al.*, 689 F.2d

391, 393, n. 3 (2d Cir. 1982), *cert. den.*, 460 U.S. 1069 (1983)).[2]

On January 6, 1981, the Town Board passed a resolution acknowledging that HHI had applied for amendment of the R-3M provision of the zoning code as a first step to securing multi-family zoning for its site. It is clear from the Board's resolution that it rejected the HHI request (14a).

Based on this record, the Court of Appeals concluded that, "the Town's refusal to amend the zoning code rendered meaningless a request to change the zoning on the Elwood-Pulaski property, as R-3M classifications were reserved for property within the urban renewal area, and there were no other multi-family housing designations" (14a).

C. Huntington's Claim That the R-3M Provision Was Expanded Pursuant to An Opinion of the Town Attorney

Appellants argue in their Jurisdictional Statement that HHI should not have relied upon the plain language of the R-3M provision limiting multi-family housing to

---

[2] In their Questions Presented, appellants argue that the Second Circuit set aside district court findings concerning whether HHI had, in fact, applied for a rezoning for Matinecock Court (Jur. State. at i). In fact, there is no factual dispute concerning the procedure that HHI followed. It is undisputed that HHI requested the Town to amend its zoning code and did not request a zoning map change. The Second Circuit merely concluded, as a matter of law, that the procedure HHI elected to follow was sufficient (14a).

the urban renewal area, but rather that HHI should have known that in 1978 Huntington's Town Attorney had issued an opinion sanctioning construction of the Lincoln Manor project just outside the urban renewal area. Huntington pressed this same claim in both the district court and the Court of Appeals. The district court rendered no findings on this claim and the Court of Appeals, based on the uncontroverted evidence, concluded that the Town Attorney's opinion was not made public until 1984 when it was extracted from Huntington by plaintiffs during the course of these proceedings (33a).

Prior to bringing this action, HHI could not have known of the existence of the Town Attorney's letter. None of the official Town documents concerning the Lincoln Manor rezoning mention that the site is outside of the Town's urban renewal area or that the Town Attorney had rendered an opinion permitting R-3M zoning for that site (T724-727; see Pl. Exs. 36, 37, 41 and 42). Moreover, the letter was not available to the public reviewing or purchasing the Town code or zoning maps (T2088-2089).[3]

---

[3] In addition, although Miness was working closely with HHI throughout 1978-1979, he never told HHI representatives about the letter (T1057, 1099). Also, on November 8, 1979, at a meeting at HUD offices in New York City, in response to a question on how the Town was able to rezone the Lincoln School site, Miness made no mention of the Glickman letter, stating only "Don't ask the gyrations we went through to get that rezoned" (T557-558).

D. Huntington Has Repeatedly Varied the Stated Reasons For Opposing the HHI Project and These Stated Reasons Are Clearly Insufficient

Huntington has continually varied its stated reasons for opposing HHI's project and, on the basis of the record before it, the Court of Appeals concluded that all of the stated reasons were insufficient (31a).

Initially, in 1980, the Town reviewed the HHI proposal pursuant to its responsibilities under the federal Housing & Community Development Program. Under this program, the Department of Housing & Urban Development (HUD) was required to refer HHI's application for federal subsidies to Huntington for comment, a process known as Section 213 review (10a). To prepare the Town's Section 213 response, Huntington's Community Development Agency undertook a study of the HHI project. The Agency's findings (45a, n. 1) were reported to Town Supervisor Kenneth C. Butterfield who included them in the Town's October 14, 1980 Section 213 letter to HUD (10a-12a). The district court held that Butterfield's Section 213 letter set forth the Town's official reasons for opposing the HHI project (30a).

At trial, however, as the Court of Appeals noted, none of Huntington's officials or witnesses testified in support of the objections in the Section 213 letter (30a). Instead, Huntington's planning expert, David Portman, in his testimony presented an entirely different set of objections to the project. The district court apparently did not consider it appropriate to review Portman's after-the-fact attacks on the HHI project, as its opinion contains no findings concerning this testimony. The Court of Appeals

agreed, holding that, "*Post hoc* rationalizations by administrative agencies should be afforded 'little deference' by the courts . . . and therefore cannot be a *bona fide* reason for the Town's action" (31a). The Second Circuit ultimately concluded that the Town's stated justifications were "weak and inadequate" (31a).[4]

In its Jurisdictional Statement, Huntington again shifts its position, raising new objections to HHI's proposal. The Town reasserts the alleged concerns raised in the Court of Appeals relating to a sanitary waste disposal system and inconsistency with the Town's comprehensive plan. The Town then adds that it opposes this project because of lack of "conformity with the low density of the surrounding neighborhood and inaccessibility of the site to public transportation" (Jur. State. at 13).

These objections have already either been rejected by the lower courts or are unsupported by any evidence in the record. For example, the Court of Appeals observed, "The sewage concern could hardly have been significant if municipal officials only thought of it after the litigation

---

[4] Appellants challenged this finding by the Second Circuit, arguing that the appellate court had engaged in unauthorized fact finding (Jur. State. at 13). This finding by the Second Circuit, however, constitutes a classic example of the correction or amendment of a district court finding predicated on a misunderstanding of the governing rule of law. See discussion at 2-3 *supra*. The district court, in considering the appellants' justifications, merely concluded that those justifications were not "pretextual" (84a) and did not marshal any evidence to support them. The Court of Appeals thus concluded that the district court had reviewed these justifications under incorrect legal standards (28a).

began. If it did not impress itself on the Town Board at the time of rejection, it was obviously not a legitimate problem" (31a). In addition, Huntington raises for the first time in this Court a concern about the project's accessibility to public transportation. The fact is, however, that HHI's parcel is located on a major thoroughfare served by a public bus which stops immediately in front of the parcel.

Despite appellants' claim to the contrary, the Town carefully studied the HHI project. Its consideration of the project is confirmed by the Town Board's January 6, 1981 resolution rejecting HHI's request for revision of the R-3M provision. The Board specifically acknowledged in that resolution that it had, "studied the various aspects of the proposal for the zoning change for 162 units at the said location at Elwood and Pulaski Roads . . . " (E53).

ARGUMENT

I.

APPEAL UNDER § 1254(2) DOES NOT LIE IN THIS CASE BECAUSE APPELLANTS DO NOT RELY ON A STATE STATUTE HELD BY A COURT OF APPEALS TO BE INVALID

Appellants assert jurisdiction for this appeal under 28 U.S.C. § 1254(2) which provides that a Court of Appeals ruling may be reviewed by the Supreme Court where a party relies "on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States." This statute has long been strictly construed by this Court based on its "overriding policy, historically encouraged by Congress, of minimizing the

mandatory docket of this Court in the interests of sound judicial administration." *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 470, n. 12 (1985), quoting *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974) (construing 28 U.S.C. § 1253). *See also, Silkwood v. Kerr McGee Corp.*, 464 U.S. 238, 247 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42, n. 1 (1970) (term "state statute" construed narrowly).

In this case, appeal does not lie under § 1254(2) for two reasons. First, the Town does not *rely* on a state statute held by the Court of Appeals to be invalid. Second, the judgment of the Court of Appeals (reprinted at 36a-37a) does not strike the ordinance in question.

The term "statute" has been defined by this Court as a "rule with continuing legal effect." *Perry, supra*, at 42. The state statute involved in this case is the R-3M provision of the Code of the Town of Huntington (§ 198-20), which allows for multi-family housing. On its face, this provision limits private multi-family housing to the Town's urban renewal area. This provision, as applied, has the effect of limiting such housing to a disproportionately minority area. Therefore, the Court of Appeals held that the limitation in the R-3M provision confining private development to the urban renewal area could not stand.

Huntington has taken the position, however, that based upon the Town Attorney's opinion letter in the Lincoln Manor rezoning, the R-3M provision, as written, has no controlling legal effect. The Town argues that it does not, in fact, limit private multi-family housing to the

urban renewal area. Rather, the Town asserts that for the past 10 years, private multi-family housing could be built in "community development areas," i.e., areas in which federal community development funds can be expended (Jur. State. at 16; Appellees' Brief to the Second Circuit at 37; Transcript of oral argument in Second Circuit, March 3, 1988 at 27-34; Amended Answer at ¶17, A39).

At trial, William Miecuna, the HUD official responsible for administering community development grants to Huntington, testified that community development funds can be spent townwide in Huntington (T434-436). Therefore, according to Huntington's own argument, R-3M zoning could have been granted by Huntington townwide even prior to the Court of Appeals' decision. The Second Circuit's directive with respect to the R-3M provision therefore is of no practical impact on the ordinance and this aspect of the Second Circuit's ruling presents no live "case or controversy" which can be reviewed by this Court. See, *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

Even if the Second Circuit's ruling altered the manner in which the R-3M provision is interpreted, the Court of Appeals' directive does not limit the Town's ultimate authority over the pattern of development in the community. The existence of the R-3M provision in the code does not automatically grant a developer the right to build multi-family housing. Rather, the provision permits a developer to apply for a zoning map change and the Town, as is the case with all zoning matters, retains ultimate discretion as to whether to grant or deny the application.

Finally, the judgment entered by the Court of Appeals makes no reference to the Town's zoning ordinance and does not order the district court to strike any part of it. The judgment directs only that appellees be granted multi-family zoning for their site – the critical relief sought by appellees in this litigation. Therefore, this Court should dismiss this appeal as not falling within the meaning of § 1254(2).

II.

THE QUESTIONS RAISED BY APPELLANTS ARE UNSUBSTANTIAL AND THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING ANY OF THE ISSUES RAISED

The opinion of the Court of Appeals in this case is based on 17 years of undisturbed case law following *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that violations of Title VII and Title VIII may occur where a facially neutral policy or practice, such as a hiring test or a zoning law, has a differential impact or effect on a particular group. Because Title VII and Title VIII are parallel statutes, "part of a coordinated scheme of federal civil rights laws enacted to end discrimination" (19a), the Courts of Appeals have uniformly applied the *Griggs* holding under Title VII to Title VIII analysis, at least with respect to governmental defendants, and have held that a Title VIII violation can be established without proof of discriminatory intent. *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 575 (6th Cir. 1986); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 988 (4th Cir. 1984); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), *cert.*

den., 435 U.S. 908 (1978); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir. 1977), *cert. den.*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. den.*, 422 U.S. 1042 (1975); *United States v. City of Parma*, 494 F.Supp. 1049, 1053 (N.D.Ohio 1980), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. den.*, 456 U.S. 1012 (1982).

Appellants themselves concede the appropriateness of applying this disparate impact standard to appellees' challenge to the R-3M provision of the zoning ordinance. They argue here, as they did in the Court of Appeals, that a disparate treatment test, regarding proof of discriminatory intent, should be applied only to the municipality's handling of a rezoning application (Jur. State. at 21; 16a-17a). As the Court of Appeals noted, under Huntington's methodology, "every disparate impact case would include a disparate treatment component. This cannot be the case. There is always some discrete event (refusal to rezone property, refusal to hire someone because he did not graduate from high school) which touches off litigation challenging a neutral rule or policy" (17a). In this case, the Second Circuit appropriately applied the well established disparate impact standard, which has been followed by the Courts of Appeals and by this Court since *Griggs*. Its application of this test raises no substantial question appropriate for review by this Court.

There is no real conflict among the Circuits regarding the proof necessary to establish a Title VIII violation on a disparate impact theory. Appellants contend that the Circuits have not consistently dealt with the regional implications of a municipality's zoning decision, and suggest

for the first time in this Court that a model should be imposed for Title VIII cases based on the "fair share" theory adopted by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. den.*, 423 U.S. 808 (1975). No Court of Appeals has adopted such a model for evaluating zoning decisions under Title VIII. Instead, the courts have considered local and regional issues as they related to the facts of specific cases. See, e.g., *United States v. City of Black Jack*, 508 F.2d at 1182-1183; *Arlington Heights II*, 558 F.2d at 1286-1288. In line with these decisions, the Second Circuit noted that HHI's project would have a desegregative effect on both the Town of Huntington and the region (25a, n. 8).

Similarly, contrary to the Town's contentions, it has been undisputed since *Griggs*, that disparate impact may be proven by a comparison of the proportionate impact of a facially neutral rule on the relevant minority population with the rule's impact on the relevant total population. In this case, the Court of Appeals correctly applied this analysis to the Town's refusal to rezone HHI's site. It noted the undisputed fact that under Huntington's HAP, 7% of all Huntington families needed subsidized housing, while 24% of black families needed such housing, and relied on the district court's undisputed finding that a significant percentage of Matinecock Court's tenants would be minority (27a, n. 11). Thus, the Court of Appeals concluded that rejection of HHI's proposal had a disproportionate effect on the black population of Huntington.

OPINION

SUPREME COURT OF THE UNITED STATES

TOWN OF HUNTINGTON, NEW YORK, ET AL., APPELLANTS *v.* HUNTINGTON BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87-1961. Decided November 7, 1988

PER CURIAM.

The motion of New York Planning Federation for leave to file a brief as *amicus curiae* is granted.

The town of Huntington, N. Y., has about 200,000 residents, 95% of whom are white and less than 4% black. Almost three-fourths of the black population is clustered in six census tracts in the town's Huntington Station and South Greenlawn areas. Of the town's remaining 42 census tracts, 30 are at least 99% white.

As part of Huntington's urban renewal effort in the 1960's, the town created a zoning classification (R-3M Garden Apartment District) permitting construction of multifamily housing projects, but by § 198-20 of the Town Code, App. to Juris. Statement 94a, restricted private construction of such housing to the town's "urban renewal area"—the section of the town in and around Huntington Station, where 52% of the residents are minorities. Although § 198-20 permits the Huntington Housing Authority (HHA) to build multifamily housing townwide, the only existing HHA project is within the urban renewal area.

Housing Help, Inc. (HHI), a private developer interested in fostering residential integration, acquired an option to purchase a site in Greenlawn/East Northport, a 98% white section of town zoned for single-family residences. On February 26, 1980, HHI requested the Town Board to com-

mit to amend § 198–20 of the Town Code to permit multifamily rental construction by a private developer. On January 6, 1981, the Board formally rejected this request. On February 23, 1981, HHI, the Huntington Branch of the National Association for the Advancement of Colored People (NAACP) and two black, low-income residents of Huntington (appellees) filed a complaint against the town and members of the Town Board (appellants) in the Federal District Court for the Eastern District of New York, alleging, *inter alia*, that they had violated Title VIII of the Civil Rights Act of 1968 by (1) refusing to amend the zoning code to allow for private construction of multifamily housing outside the urban renewal zone and (2) refusing to rezone the proposed site to R–3M. Appellees asserted that both of these claims should be adjudicated under a disparate impact standard. Appellants agreed that the facial challenge to the ordinance should be evaluated on that basis, but maintained that the decision not to rezone the proposed project site should be analyzed under a discriminatory intent standard.

Following a bench trial, the District Court rejected appellees' Title VIII claims. 668 F. Supp. 762 (EDNY 1987). The Court of Appeals for the Second Circuit reversed as to both claims. 844 F. 2d 926 (1988). The Court of Appeals held that, in order to establish a *prima facie* case, a Title VIII plaintiff need only demonstrate that the action or rule challenged has a discriminatory impact. As to the failure to amend the zoning ordinance (which is all that concerns us here), the court found discriminatory impact because a disproportionately high percentage of households that use and that would be eligible for subsidized rental units are minorities, and because the ordinance restricts private construction of low-income housing to the largely minority urban renewal area, which "significantly perpetuated segregation in the Town." *Id.*, at 938. The court declared that in order to rebut this *prima facie* case, appellants had to put forth "bona fide and legitimate" reasons for their action and had to dem-

onstrate that no "less discriminatory alternative can serve those ends." *Id.*, at 939. The court found appellants' rationale for refusal to amend the ordinance—that the restriction of multifamily projects to the urban renewal area would encourage developers to invest in a deteriorated and needy section of town—clearly inadequate. In the court's view, that restriction was more likely to cause developers to invest in towns other than Huntington than to invest in Huntington's depressed urban renewal area, and tax incentives would have been a more efficacious and less discriminatory means to the desired end.

After concluding that appellants had violated Title VIII, the Court of Appeals directed Huntington to strike from § 198–20 the restriction of private multifamily housing projects to the urban renewal area and ordered the town to rezone the project site to R–3M.

Huntington seeks review pursuant to 28 U. S. C. § 1254(2), on the basis that, in striking the zoning limitation from the Town Code, the Court of Appeals invalidated "a State statute . . . as repugnant to" Title VIII, a "la[w] of the United States." Viewing the case as involving two separate claims, as presented by the parties and analyzed by the courts below, we note jurisdiction, but limit our review to that portion of the case implicating our mandatory jurisdiction. Thus, we expressly decline to review the judgment of the Court of Appeals insofar as it relates to the refusal to rezone the project site.

Since appellants conceded the applicability of the disparate impact test for evaluating the zoning ordinance under Title VIII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown, and that the sole justification proffered to rebut the *prima facie* case was inadequate. The other points presented to challenge the court's holding with regard to the ordinance do not present substantial federal

questions. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, JUSTICE MARSHALL and JUSTICE STEVENS would note probable jurisdiction and set the case for oral argument.